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Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1946

Publication of this Document Approved by the Commission on Administration and Finance

00. 7-'47. 21567

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The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 30, 1946.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending June 30, 1946.

Very respectfully,

CLARENCE A. BARNES,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

State House

Attorney General

CLARENCE A. BARNES

First Assistant Attorney General

GEORGE B. ROWELL

Assistants

ROGER CLAPP
NATHAN B. BIDWELL
WILLIAM S. KINNEY
CHARLES SHULMAN
GEORGE P. DRURY[1]
MICHAEL A. FREDO
DAVID J. CODDAIRE
ALFRED E. LOPRESTI
HERBERT D. ROBINSON
NORRIS M. SUPRENANT
SUMNER W. ELTON
WM. GARDNER PERRIN
WILLIAM H. SULLIVAN
ERNEST BRENNER
THOMAS F. MCLAUGHLIN
CONDE J. BRODBINE
BEATRICE H. MULLANEY
RICHARD J. COTTER, JR.

Assistant Attorneys General assigned to Veterans' Division

NICHOLAS DELEO
JOEL L. MILLER

Assistant Attorneys General assigned to Division of Employment Security

SAUL GURVITZ
JOSEPH S. MITCHELL

Chief Clerk to the Attorney General

HAROLD J. WELCH

List Clerk to the Attorney General

JAMES J. KELLEHER

Director of Division of Collections

W. FORBES ROBERTSON

[1] Specially assigned to New York, New Haven and Hartford Railroad and Boston Elevated Railway cases.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1945, to June 30, 1946

Attorney General's salary	$ 8,420 00
Assistants and others, salaries	135,540 00
Expenses	12,000 00
Settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B)	8,000 00
Settlement of certain claims (G. L. (Ter. Ed.) c. 12, § 3A)	4,000 00
Veterans' legal assistance	20,000 00
New York, New Haven, and Hartford Railroad	553 46
	$188,513 46

Expenditures.

For salary of the Attorney General		$ 8,420 00
For salaries of assistants and others:		
Actual expenditures	$121,629 11	
Amount reserved	13,910 89	
		135,540 00
For office expenses:		
Actual expenditures	$9,873 46	
Amount reserved	1,126 54	
		11,000 00
For settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B)		7,471 53
For settlement of certain claims (G. L.(Ter. Ed.) c. 12, § 3A)		3,506 66
For veterans' legal assistance:		
Actual expenditures	$11,168 99	
Amount reserved	319 00	
		11,487 99
Total expenditures		$177,426 18

Financial statement verified (under requirements of c. 7, § 19, G. L.).

By EDWIN J. TURNER,
For the Comptroller.

Approved for publishing.

FRED A. MONCEWICZ,
Comptroller.

December 23, 1946.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 30, 1946.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws (Tercentenary Edition), as amended, I herewith submit my report.

The cases requiring the attention of this Department during the fiscal year ending June 30, 1946, totaling 10,976, are tabulated as follows:

Corporate franchise tax cases	2
Extradition and interstate rendition	155
Land Court petitions	93
Land damage cases arising from the taking of land:	
Department of Public Works	24
Metropolitan District Commission	3
Metropolitan District Water Supply Commission	12
Miscellaneous cases, including suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	2,002
Petitions for instructions under inheritance tax laws	6
Estates involving applications of funds given to public charities	662
Settlement cases for support of persons in state hospitals	88
Pardons:	
Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127, § 152, as amended	116
Workmen's compensation cases, first reports	1,932
Cases in behalf of Division of Employment Security	1,081
Cases in behalf of Veterans' Division	4,800

To serve all the people of the Commonwealth as their attorney is to my mind the privilege and the duty of the Attorney General.

In serving the people as their attorney, I have, since assuming office, conferred with the District Attorneys and their assistants, formally on two occasions and informally at many other times, to the end that the enforcement of law throughout the Commonwealth might be conducted harmoniously, with fairness to all, and so that justice might be even-handed.

The matters of sex crimes and juvenile delinquency have been formally discussed by the District Attorneys and their assistants with me, and meetings have been held with police authorities. At the annual meeting of the National Association of Attorneys General, these matters were discussed at length, and I have secured information from other States

as to their methods of handling these problems. At one of the meetings of the District Attorneys and their assistants, the following resolution was passed:

Resolved, That the District Attorneys of the Commonwealth request the Legislature to authorize a further study of the cause and prevention of serious sex crimes, as well as the advisability of imposing substantial mandatory sentences upon conviction and a more stringent supervision of offenders upon their release; it is further

Resolved, That pending results of a legislative investigation, all law enforcement officers will continue full co-operation with the Attorney General and the District Attorneys in the enforcement of existing laws and prosecution of sex law offenders.

I recommend that legislation be enacted by this Legislature to carry out the suggestions contained in the first paragraph of this resolve, as I believe that within the Commonwealth of Massachusetts every effort must be made to secure an adequate solution of these problems.

I believe that these meetings with the District Attorneys, their staffs, and law enforcement officers have been of substantial benefit to the citizens of the Commonwealth. I find that in the State of California, and in other States, specific authority is given to the Attorney General to call such meetings. I therefore recommend the enactment of the following law:

The attorney general may, from time to time, and as often as occasion may require, call into conference the district attorneys and sheriffs of the several counties and the chiefs of police of the several cities and towns of this commonwealth, or such of them as he may deem advisable, for the purpose of discussing the duties of their respective offices with the view of uniform and adequate enforcement of the laws of this commonwealth.

During my term of office, with the co-operation of the Department of Public Health, substantial strides have been made, through enforcement of the orders of the Department of Public Health in the courts, toward stopping the pollution of our streams with sewage, waste and putrescible matter. I am convinced that it is important that this work be continued and expanded in this Department. I recommend that for the coming year two additional Assistant Attorneys General be provided for in the budget to carry out this important work.

When I assumed office, there were certain claims pending against various milk dealers in the Commonwealth who questioned their liability to pay Milk Control Board assessments which were due the Commonwealth previous to 1942, the effective date of the present milk control law. In addition to this, a substantial group of milk dealers had in the past refused to pay assessments due following the effective date of the act concerning this matter passed in 1941 by the Legislature. Suits were brought under my direction in connection with this refusal to pay. As a result of these suits, substantially twenty thousand dollars has been collected and the milk companies are paying the assessments.

As Attorney General I have continuously given advice to elected officers, department heads and members of the Legislature, either through formal opinions or, more frequently, by informal advice. I have sought at all times, with the help of able legal assistants, to conduct this Department with efficiency and a high standard of administration.

In accordance with the pledge which I made to the people of this Commonwealth when I first assumed the office of Attorney General, I immediately established a veterans' division which could freely advise and act in behalf of the veteran, his widow, orphans and other dependents. Two Assistant Attorneys General have devoted their entire time to this division. A complete file of the work of the division is kept containing the record of the applicants' problems and notations of the advice given and work done. In addition, there have been innumerable personal requests for information and advice given by telephone. Many letters have been received in which requests were made for information. These have been promptly answered. The work of this division is constantly increasing. I have caused to be published two reports of the division which set forth the types of cases and the work that has been done so ably by this staff. I am appending hereto copies of each of these reports. I believe that the work of this division should be continued and, if possible, expanded.

The development of the airport at Boston and the Port of Boston is of paramount importance to all the citizens of the Commonwealth. Many problems in connection with both have come to this Department. On numerous occasions, either in person or through one of my assistants, appearances have been made on behalf of the citizens of Massachusetts before the Civil Aeronautics Board at Washington, seeking to secure additional rights for Boston Logan International Airport. Similarly, many of the problems of the development of the Port of Boston have required my attention or that of my assistants.

The Supreme Court having decided the demurrer in the case brought by the Attorney General (my predecessor in office) against the Trustees of the Boston Elevated Railway Company and the Boston Elevated Railway Company, a substantial portion of the time of four assistants and a chief investigator has been occupied in connection with this case. I have, with the approval of the Department of Public Utilities, employed Price, Waterhouse & Company, a leading firm of auditors, to make a complete investigation of the books of the Boston Elevated Railway Company and the Trustees. I have also, with like approval, employed the firm of Coverdale & Colpitts as engineers in order to secure expert advice with respect to matters involving depreciation, rehabilitation and betterments of the property of the company. I anticipate that this case will be reached for trial during the month of April, 1947, and that the length of time consumed in trial will be from three to six months. This will require the entire time of four of my assistants and a substantial portion of my time, as well as additional funds.

I have not attempted in this report to set forth in detail many of the activities of the Department. Suffice it to say that on many occasions throughout my term of office, each commission, board, division and department of the Commonwealth has sought legal advice from this Department with respect to various matters which are under its charge. Contracts have been examined and approved, hearings have been attended and conducted on behalf of the various state departments by this Department, and settlements of inheritance taxes, state note issues, bond issues and leases have been approved.

There have been many interviews and consultations with city solicitors, town counsellors, members of the Legislature and attorneys.

It is my sincere belief that the Assistant Attorneys General and the other members of the Department have carried out their duties with dignity, ability and loyalty, not only to myself, but to the Commonwealth of Massachusetts.

Respectfully submitted,

CLARENCE A. BARNES,
Attorney General.

REPORT OF THE VETERANS' DIVISION.

MESSAGE TO WORLD WAR II VETERANS AND THEIR DEPENDENTS.

The Veterans' Division of the Department of the Attorney General was set up for you over a year ago upon my assuming the duties of Attorney General of the Commonwealth on January 17, 1945. The following pages will tell you about the services of this division, Kinds of Cases, Some Interesting Facts, Veterans' Legislation and Hints for Veterans.

To take over the work of this division I appointed Joel L. Miller, a veteran of World War I, past state commander of Veterans of Foreign Wars and active in veteran affairs as legal adviser for many years; Nicholas DeLeo, a veteran of World War II, member of the American Legion, former staff member of the Legal Division of the Massachusetts Selective Service System; and Lillian V. Macdonald who has had many years experience in counselling and state administrative work. I am very much pleased with the work that they have done in your behalf.

We are all proud of the men and women of Massachusetts who have so honorably served their country. We can never repay those who will not return nor can we console their families for the great loss of their loved ones. But we at home have a very important job to do not only in continuing to watch over the general welfare of our heroes, their dependents, widows and orphans but we must see that they have full protection under the laws of the Commonwealth.

Now that active war has ceased, we know that the greatest need of protection, is not from the danger of our enemies but from discontent, confusion and discouragement which will face many of you in the months ahead. We have endeavored to assist you, who have served so gallantly and well during the war emergency, and to help with your problems so that you will be able to make the necesssary adjustments when you take up your responsibilities upon returning to civilian life.

As Attorney General and as a public servant of the people I stand ready to do everything in my power to fight for the legal rights of our veterans and their dependents so that their sacrifice in serving their country will not have been in vain. The Veterans' Division is for you and may I extend a most sincere and cordial invitation for you to make use of it to the fullest measure. Your valued suggestions will be most welcome.

Sincerely yours,

CLARENCE A. BARNES, *Attorney General.*

Kinds of Cases.

Bonus. — Establishing domicile six months prior to entering military service.

Civil Service. — Status of veteran as an employee after military leave of absence, also standing on lists which expired while in service.

Contracts. — Contracts or agreements signed by veteran under possible fraudulent circumstances, and advice and information on court procedure to protect his rights.

Divorces. — Problems of out-of-state marriages, divorces and general information on probate court procedure.

Domestic Cases. — Discord in homes, incompatibility, interference of in-laws and housing difficulties.

Educational. — Rights under G. I. Bill, approved schools, on the job training and subsistence.

Evictions. — O. P. A. regulations and court procedure in evicting tenants especially because of change of ownership.

Fraud. — Used car, real estate and furniture frauds, etc.

Furniture Cases. — Installment contracts, second hand furniture sold for new.

Loans. — Charges of excessive rates of interest to veterans while in the military service.

Licenses, Permits. — Eligibility and regulations concerning the operation of trucks, business, taxis, hawkers, etc.

Re-employment. — Not being given the same position or a position of like seniority, status and pay.

Retirement. — Advice and information as to how laws affect World War I and World War II veterans.

Real Estate. — The various housing problems arising when veterans buy a home without protection of agreement and are unable to occupy.

Veterans Legislation. — Inquiries by veterans on World War I and World War II legislation.

Miscellaneous. — Auto left for repairs sold; claim for back salary; transportation for war brides; veterans inquiring about surplus commodities; veterans interested in forming a partnership or corporation.

Some Interesting Facts.

1. More than 1,500 veterans, including their parents, wives, widows and dependents, have been interviewed in our office, asking a wide range of questions covering the kind of cases outlined in this pamphlet.

2. Hundreds of veterans leave our office with their worries a thing of the past after giving them the necessary legal advice and counsel so that they can take the proper steps to correct some particular situation that was causing them untold misery and worry.

3. Men and women still in the military service seek advice on problems that they will face upon discharge. There are also many inquiries from the legal staffs of Separation Centers seeking up-to-date information on benefits for veterans.

4. Veterans come to the division from every county in the Commonwealth and most of the cities and towns, from other States and a few from the military forces of our allied nations.

5. Referrals have come to this Division from the various Veterans' Centers throughout the Commonwealth — the Veterans of Foreign Wars, American Legion, Disabled American Veterans, Jewish War Veterans, American Veterans, Army and Navy Legal Departments, Necessities of Life, Legislators and heads of state, county, city and town departments, many citizens, Labor Unions, private attorneys, O. P. A., Selective Service and other federal and state agencies.

6. Over a thousand telephone inquiries have been received and answered regarding veterans' problems.

7. Nine hundred and eighty-five letters have been written to veterans and their dependents in reply to their requests for information. Our correspondence is very heavy from those still in the service and from military officials handling legal affairs, particularly concerning the state bonus.

8. Thousands of dollars have been saved the veterans in counselling and in settlement of veterans' matters concerning furniture deals, loan claims, real estate and frauds.

9. Many domestic relations cases have been prevented from being post-war casualties by guidance and counselling and patiently listening to the veteran.

10. Massachusetts is the only State where an Attorney General has set up a Veterans' Division within his department.

11. So many veterans appealed to this office for help with their eviction problems that I presented to the Legislature a bill granting the judges more discretion in the matter of evictions, thereby saving veterans and others from undue hardship in being evicted from their homes.

12. We have also had a part in legislation for the benefit of veterans. In fact, many such laws passed during the 1945 and 1946 legislative sessions have originated from suggestions by the Veterans' Division staff to the members of the Legislature.

13. Assistant Attorneys General Joel L. Miller and Nicholas DeLeo have presented cases to the federal courts on problems of re-employment on behalf of veterans of this Commonwealth under the following law.

14. The Veterans' Division was established by the Acts and Resolves of 1941, chapter 708, section 15:

"Upon the application of any resident of the commonwealth who entered said military or naval service and has received an honorable discharge or release therefrom, the attorney general and the adjutant general are hereby severally authorized and directed to take such legal and proper measures as may result in the reinstatement of such resident by his former employer in the position which such resident held immediately prior to entering such service. On such application, he or they shall also inform such resident of his rights under the federal Selective Training and Service Act of 1940, under the federal Soldiers' and Sailors' Civil Relief Act of 1940 and under Public Resolution No. 96–76th Congress, approved August twenty-seventh, nineteen hundred and forty, and shall co-operate with

the proper official or officials of the United States department of justice in obtaining for such resident his rights under either or both of such acts. Upon the making of any such application the former employer of such resident shall be notified thereof by the attorney general or the adjutant general, as the case may be, and be furnished with a copy of this section."

Veterans' Legislation as applied to World War II Applicants.

Bonus.

Each person who shall have served in the armed forces of the United States on or after September 16, 1940, and prior to the termination of the present war, and shall have received a discharge or release other than a dishonorable one from such service, shall be paid the sum of one hundred dollars; provided, that the domicile of such person on account of whose service the application is filed shall have been in the Commonwealth for a period of not less than six months immediately prior to the time of his entry into service.

Civil Service Examinations.

No veteran will be disqualified by reasons of age from taking examinations under chapter 31 if at time of entry into military service he was of proper age to qualify.

Creditable Service.

Employee while member of contributory system of Commonwealth, when reinstated or re-employed in his former position, will have credited to him the amount of deductions that would have been credited had he not been in the armed forces, as a creditable service under the retirement law.

Higher Education.

Any child, resident of the commonwealth and not under sixteen whose father or mother was killed in action or died from cause service connected will be eligible to receive certain expenses to be paid for higher education.

Income Tax.

Any person in the armed forces serving outside continental United States or on sea duty may delay time of filing to six months after discharge or eighth month following the month in which present war is terminated.

Leave of Absence.

Any employee of state or any political division thereof who on or after January 1, 1940, shall have tendered his resignation or left the service to enter the armed forces shall be deemed to have been on leave of absence and may return if he so requests in writing to the appointing authority and also files a certificate of a registered physician that he is not physically disabled or incapacitated for performing the duties of said position. If position is under chapter 31 (Civil Service) he may return within two years.

If position is not under chapter 31 he may return within one year, provided, that in case he was appointed for a fixed term, the term has not expired.

Legal Rights of Minors.

A veteran under twenty-one years of age who is a resident of this commonwealth and entitled to benefits provided by Federal Law known as the G. I. Bill of Rights may participate in such benefits and shall have full legal capacity to act in his own behalf in the matter of contracts, conveyances, mortgages and other transactions and with respect to such acts done by him he shall have all of the rights, powers and privileges and be subject to the obligations of a person of full age.

Motor Vehicle Licenses.

When license expires while holder is serving in the military or naval forces no fee will be charged *for examination for renewal* of license to operate motor vehicle if application for such renewal is made within six months after termination of such service.

Pedlers and Hawkers Licenses.

Director may grant a special state license to a totally or partly disabled veteran who is a resident of the commonwealth, without fee, on proof of identity.

Reinstatement — State Service.

A veteran restored to service of state, county, city or town shall be entitled to all seniority rights to which he would have been entitled if his service had not been interrupted, and any such person whose salary is fixed under a classified compensation plan shall be eligible to a salary rate which includes accrued step rate increments to which he would have been eligible had he not gone into the armed forces.

Retirement.

Any veteran whose employment by the commonwealth or any political subdivision thereof was interrupted by his entrance into the armed forces and is eligible for reinstatement, may be retired under the retirement law applicable to him without such reinstatement, if he is physically or mentally incapable of being reinstated and if he is otherwise eligible for retirement, provided his discharge was not dishonorable.

A "Veteran," under the retirement act (chapter 658), is "any person who has served in the army, navy, coast guard or marine corps of the United States, or in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States, in time of war or insurrection and whose last discharge or release from active duty was under conditions other than dishonorable, regardless of any prior discharge or release therefrom; provided, that no member of the United States coast guard auxiliary and no temporary member of the United States coast guard reserve shall be deemed to be a 'veteran' within the meaning of this definition."

Hints for Veterans.

Business.

If starting a business check town and city ordinances and laws.
"Partner Wanted" ads soliciting new funds are many times deceptive.
Beware of promoters exaggerating earnings of vending machines.
If investing in new invention see patent lawyer for advice.

Contracts.

If furniture is sent C. O. D. inspect carefully before making payment.
When signing any contract be sure you ask for a copy.
Make sure contract describes items fully.
Contract or lease should list the price of each item.
Do not sign any blank contract or agreement to be filled in later.
Do not mix terms of an old contract with a new one.
Read carefully provisions on "carrying charges" in installment leases.
It is wise to specify in writing who bears loss for goods damaged.
Do not let a seller hurry you into signing a contract.
It may be fraud if seller refuses to give you a copy of contract.
Contract should guarantee the fitness of items purchased.

Loans.

Avoid "Loan sharks" imposing unfair interest charges.
Pay no more than 6% a year on any loans while in the service.
Have G. I. Loan purchase appraised before making a down payment.

Real Estate.

When buying real estate first consult an appraiser.
It is wise to have agreement drawn up and title checked by lawyer.
Check for structural and mechanical defects before buying.
Agreements should fully specify all terms and conditions involved.
To occupy immediately agreement should read "free of tenants".
Inquire about tenancy status of occupants before buying a house.
Have agreements drawn up legally before making deposit.

Sales of Personal Property.

Check carefully as to ownership before buying personal property.
Take inventory of goods when buying a store.
Beware of unwritten promises or oral contracts.
Check alteration or repair work for defects before final payment.
When buying a store check on outstanding landlord and tenant lease.

Used Cars.

When buying a used car or truck take a mechanic with you.
Beware of any purchase if agreement reads "Sold as is".
Be sure deposit will be returned in event terms cannot be financed.
Avoid signing agreement unless all guarantees are included therein.
Do not finance agreement unless payment can be made from earnings.
Promises by seller to replace used car parts should be in writing.
Check O. P. A. ceiling prices before buying used car.

SUPPLEMENTARY REPORT OF THE VETERANS' DIVISION.

Kinds of Cases.

Bonus. — Establishing domicile six months prior to entering military service.

Civil Service. — Status of veteran as an employee after military leave of absence, also standing on lists which expired while in service.

Contracts. — Contracts or agreements signed by veteran under possible fraudulent circumstances, and advice and information on court procedure to protect his rights.

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hereby severally authorized and directed to take such legal and proper measures as may result in the reinstatement of such resident by his former employer in the position which such resident held immediately prior to entering such service. On such application, he or they shall also inform such resident of his rights under the federal Selective Training and Service Act of 1940, under the federal Soldiers' and Sailors' Civil Relief Act of 1940 and under Public Resolution No. 96–76th Congress, approved August twenty-seventh, nineteen hundred and forty, and shall co-operate with the proper official or officials of the United States department of justice in obtaining for such resident his rights under either or both of such acts. Upon the making of any such application the former employer of such resident shall be notified thereof by the attorney general or the adjutant general, as the case may be, and be furnished with a copy of this section."

Veterans' Legislation as applied to World War II Applicants.

Bonus.

First Bonus. — Each person who shall have served in the armed forces of the United States on or after September 16, 1940, and prior to the termination of the present war, and shall have received a discharge or release other than a dishonorable one, from such service, shall be paid the sum of one hundred dollars; provided, that the domicile of such person on account of whose service the application is filed shall have been in the Commonwealth for a period of not less than six months immediately prior to the time of his entry into service. Chapter 731, 1945.

Additional Bonus. — In addition to the sum of one hundred dollars paid under chapter 731 of the Acts of 1945, payments shall be made to persons and in sums as follows:

1. One hundred dollars to each person who performed active service for more than six months, but served no part thereof in Alaska or in any place outside the continental limits of the United States.

2. Two hundred dollars to each person who performed active service outside the continental limits of the United States or in Alaska.

Note. — Such persons include Commissioned Corps of the United States Public Health Service and Officers of the United States Coast and Geodetic Survey assigned to active duty. Chapter 581, 1946.

Civil Service.

Municipal Offices. — An act relative to the placing under Civil Service of certain offices: In computing the period of five years, or ten years, as the case may be, of continuous service required under section forty-nine A of chapter thirty-one of the General Laws of an incumbent of a municipal office who has entered said military or naval service and returns to said office within two years after the termination of said service, the period between his entry into said service and his return to said office shall be counted. Chapter 61, 1946.

Women Veterans. — Women veterans of World War II eligible immediately for provisional appointments under Civil Service Laws. Chapter 145, 1946.

Police or Fire Service. — Any veteran who will have attained the age of twenty-one on or before the date of any scheduled examination for police or fire service shall not be deemed ineligible for examination and appointment because of established minimum age requirements to take said examination; provided, that he meets all other pertinent requirements of the Civil Service Laws and Rules. Chapter 221, 1946.

Certificate. — A certificate of a registered physician relative to a veteran's physical qualification for any office or position need not be filed, if the director of civil service has not fixed physical standards as a prerequisite to eligibility for original appointment to said office or position. Chapter 238, 1946.

Medal of Honor. — A veteran who has received a distinguished service cross or navy cross may, upon the recommendation of the director and with the approval of the Civil Service Commission, be appointed under the same conditions as are provided in the case of a person who has received a medal of honor which entitles him to apply to the director for appointment or employment in the classified Civil Service without examination. Chapter 345, 1946.

State Police Officers. — An act making a veteran of World War II eligible in certain cases for enlistment or appointment as a state police officer, provided that at the time of his entry into the armed forces he was less than thirty years of age and that his enlistment or appointment as such an officer is made within three years of his discharge. Chapter 260, 1946.

Separation from State Service. — A veteran, who holds an office or position in the service of the Commonwealth not classified under civil service, other than an elective office, an appointive office for a fixed term or an office or position under section seven of chapter thirty, and has held such office or position for not less than ten years, shall not be involuntarily separated from such service except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. Chapter 269, 1946.

Examinations. — No veteran will be disqualified by reasons of age from taking examinations under chapter 31 if at time of entry into military service he was of proper age to qualify. Chapter 440, 1945.

Commonwealth Citations.

Citations. — An act providing for the issuance by the Commonwealth, to certain persons who served in the armed forces of the United States during World War II, of citations or certificates as to such service. Chapter 459, 1946.

An act providing for the issuance by the Commonwealth, to certain heirs-at-law of persons who died while serving in the armed forces of the United States during World War II, or as a result of such service, of citations or certificates as to such service and death. Chapter 469, 1946.

Creditable Service.

Retirement Law. — Employee while member of contributory system of Commonwealth when reinstated or re-employed in his former position will have credited to him the amount of deductions that would have been credited, had he not been in the armed forces, as a creditable service under the retirement law. Chapter 671, 1945.

Education.

University Extension Courses. — An act extending to veterans of World War II the advantages of university extension courses free of charge for a period of not more than four years. Chapter 439, 1946.

Instruction. — An act providing temporarily for a course of school instruction beyond the regular high school course of instruction for the benefit of veterans and others. Chapter 532, 1946.

Higher Education. — The Commonwealth, acting through the Department of Education, may contribute $250 toward the expenses of the higher education of any child, resident in the Commonwealth and not under sixteen years of age, whose father or mother entered the armed forces of the United States in time of war and was killed in action or died from other cause as a result of such service. Chapter 548, 1946.

Apprentice Training. — An act relative to the appointment of veterans to civil service employments under the apprentice training provisions of the G. I. Bill of Rights, so called.

Section 1. The director of civil service may, upon request of an appointing authority, approve the employment, for a period not to exceed three years, of any veteran trainee authorized under the federal program designed to give apprentice training, or "on the job" training, to veterans in employments within the classified civil service. . . .

Section 2. This act shall remain in effect only until July first, nineteen hundred and forty-seven, but employments approved prior thereto may continue for the period approved hereunder. Chapter 586, 1946.

Housing.

Housing Units. — An act making an appropriation for furnishing certain facilities for housing units for war veterans enrolled at the Massachusetts State College. Chapter 74, 1946.

Housing. — An act to provide housing for veterans of World War II. A veteran: a man or woman who served in the Army or Navy of the United States at any time on or after December 7, 1941, and before the conclusion of World War II, and has been separated therefrom under conditions other than dishonorable. The term shall also include the widow or the mother of a man who so served and who died while in such service and the wife of a man who is still serving in said Army or Navy . Chapter 372, 1946.

Hospitalization.

Soldiers' Home in Holyoke. — The Board of Trustees of the Soldiers' Home in Massachusetts is hereby authorized and directed to construct a

two-hundred-bed soldiers' home where hospital and domiciliary care shall be provided in like manner as that provided at the soldiers' home in the city of Chelsea. The eligibility of persons for admission to and treatment at the soldiers' home shall be governed by the eligibility requirement for admissions and treatment at said home in Chelsea. Chapter 475, 1946.

Legal Rights of Minors.

Contracts, etc. — Any veteran under twenty-one years of age who is a resident of this Commonwealth and entitled to benefits provided by Federal Law known as the G. I. Bill of Rights may participate in such benefits and shall have full legal capacity to act in his own behalf in the matter of contracts, conveyances, mortgages and other transactions, and with respect to such acts done by him he shall have all of the rights, powers and privileges and be subject to the obligations of a person of full age. Chapter 408, 1945.

Licenses.

Hunt and Fish. — An act relative to the issuance to persons in the military or naval service of the United States of special certificates entitling them to hunt and fish in this Commonwealth. Chapter 178, 1946.

Electricians. — An act granting a credit of 5% to the examination standing of certain veterans applying for electricians' licenses. Chapter 480, 1946.

Plumbers. — An act granting a credit of 5% to the examination standing of certain veterans applying for plumbers' licenses. Chapter 502, 1946.

Educational Qualifications. — An act exempting veterans of World War II from certain requirements of law for authority to engage in a trade or occupation. Such applicants shall be subject only to such educational and experience qualifications as were required by the provisions of law in force immediately prior to said September 16, 1940. Chapter 577, 1946.

Loans.

Banking and Insurance. — An act relative to the making by banking and insurance companies of loans to veterans of World War II guaranteed or insured by the Administrator of Veterans' Affairs. Chapter 126, 1946.

Motor Vehicle License.

Examination for Renewal. — When license expires while holder is serving in the military or naval forces, no fee will be charged for examination for renewal of license to operate motor vehicle if application for such renewal is made within six months after termination of such service. Chapter 258, 1945.

Pedlers' and Hawkers' Licenses.

Disabled Veterans. — Director may grant a special state license to a totally or partly disabled veteran who is a resident of the Commonwealth, without fee, on proof of identity. Chapter 493, 1945.

Re-employment.

Leave of Absence. — Any employee of State or any political division thereof who, on or after January 1, 1940, shall have tendered his resignation or left the service to enter the armed forces, shall be deemed to have been on leave of absence, and may return if he so requests in writing to the appointing authority and also files a certificate of a registered physician that he is not physically disabled or incapacitated for performing the duties of said position. Chapter 708, 1941.

Seniority. — A veteran who returns or is restored to service in an office or position in the service of the Commonwealth or any political subdivision thereof within two years after having served in the military or naval forces of the United States shall be entitled to all seniority rights to which he would have been entitled if his service had not been interrupted by such military or naval service, and any such person whose salary is fixed under a classified compensation plan shall be eligible to a salary rate which includes accrued step-rate increments to which he would have been eligible except for absence on such military or naval service. Chapter 62, 1946.

Retirement.

Without Reinstatement. — Any veteran whose employment by the Commonwealth or any political subdivision thereof was interrupted by his entrance into the armed forces and is eligible for reinstatement, may be retired under the retirement law applicable to him without such reinstatement, if he is physically or mentally incapable of being reinstated, and if he is otherwise eligible for retirement, provided his discharge was not dishonorable.

A veteran under the retirement act (chapter 658, 1945) is any person who has served in the army, navy, coast guard or marine corps of the United States, or in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States, in time of war or insurrection, and whose last discharge or release from active duty was under conditions other than dishonorable, regardless of any prior discharge or release therefrom; provided, that no member of the United States coast guard auxiliary and no temporary member of the United States coast guard reserve shall be deemed to be a "veteran" within the meaning of this definition. Chapter 610, 1945.

Transportation.

Special Transportation and Rates. — An act authorizing street railway companies to provide special cars and make special rates for veterans of World War II who are attending educational institutions under the G. I. Bill of Rights. Chapter 253, 1946.

Taxation.

Exemptions. — Two thousand dollars of the combined estate of any veteran and his wife shall be exempted from taxation, provided that the whole estate, real and personal, of the person so exempted on the com-

bined property of a veteran and his wife does not exceed eight thousand dollars, exclusive of value of mortgage interest by persons other than the person exempted. Veterans of all wars who were honorably discharged, or honorably released, and who in line of duty lost the sight of one eye or both, or either or both hands or feet, or who have a disability rating, *service connected of twenty per cent* as determined by the Veterans Administration, and the wives or widows of said veterans shall be eligible to said exemption. Chapter 579, 1946.

Income Tax. — An act relieving persons who served in the existing war as enlisted personnel from the payment of income taxes upon their pay for such service, and providing that any person serving as a commissioned officer in said war shall have three years to pay any income tax accruing during the period of such service. Chapter 604, 1946.

Vacations.

Vacation Allowance. — Any veteran in the service of the Commonwealth, who, prior to April thirtieth, nineteen hundred and forty three, resigned or was granted a leave of absence from the service of the Commonwealth to enter the armed forces of the United States during the present war, and who, upon honorable discharge from such service in said armed forces, has returned or returns to the service of the Commonwealth, shall be paid an amount equal to the vacation allowance as earned in the vacation year prior to his entry into such service in said armed forces which had not been granted prior to military leave, and, in addition, that portion of the vacation allowance earned in the vacation year during which he entered such service, up to the time of military leave; provided, that no monetary or other allowance has already been made therefor. Chapter 430, 1946.

Veterans' Benefits.

Veterans' Funerals and Burials. — Under this act cities and towns may reimburse to a limited amount to the American Legion, Veterans of Foreign Wars and Disabled American Veterans for funerals and burials of those who died overseas in World War II, provided they were residents of Massachusetts when entering the military service; this expenditure to be paid by the Commonwealth to the municipality. Chapter 573, 1946.

Veterans' Services.

Municipal Veterans' Services, Information, Advice. — Requires cities and towns to set up departments to advise and assist veterans of all wars, in obtaining employment, education, hospital care, pensions and benefits. Chapter 599, 1946.

Hints for Veterans.

Business.

If starting a business check town and city ordinances and laws.
"Partner Wanted" ads soliciting new funds are many times deceptive.
Beware of promoters exaggerating earnings of vending machines.
If investing in new invention see patent lawyer for advice.

Contracts.

If furniture is sent C. O. D. inspect carefully before making payment.
When signing any contract be sure you ask for a copy.
Make sure contract describes items fully.
Contract or lease should list the price of each item.
Do not sign any blank contract or agreement to be filled in later.
Do not mix terms of an old contract with a new one.
Read carefully provisions on "carrying charges" in installment leases.
It is wise to specify in writing who bears loss for goods damaged.
Do not let a seller hurry you into signing a contract.
It may be fraud if seller refuses to give you a copy of contract.
Contract should guarantee the fitness of items purchased.

Loans.

Avoid "Loan sharks" imposing unfair interest charges.
Pay no more than 6% a year on any loans while in the service.
Have G. I. Loan purchase appraised before making a down payment.

Real Estate.

When buying real estate first consult an appraiser.
It is wise to have agreement drawn up and title checked by lawyer.
Check for structural and mechanical defects before buying.
Agreements should fully specify all terms and conditions involved.
To occupy immediately agreement should read "free of tenants".
Inquire about tenancy status of occupants before buying a house.
Have agreements drawn up legally before making deposit.

Sales of Personal Property.

Check carefully as to ownership before buying personal property.
Take inventory of goods when buying a store.
Beware of unwritten promises or oral contracts.
Check alteration or repair work for defects before final payment.
When buying a store check on outstanding landlord and tenant lease.

Used Cars.

When buying a used car or truck take a mechanic with you.
Beware of any purchase if agreement reads "Sold as is".
Be sure deposit will be returned in event terms cannot be financed.
Avoid signing agreement unless all guarantees are included therein.
Do not finance agreement unless payment can be made from earnings.
Promises by seller to replace used car parts should be in writing.
Check O. P. A. ceiling prices before buying used car.

OPINIONS.

Retirement — Teachers — Annual Salaries.

July 9, 1945.

Mr. Hugh P. Baker, *President, Massachusetts State College.*

Dear Sir: — You have sent me the following communication:

"Two teachers at this College who reached age 70 during the school year just closed have been notified by the State Board of Retirement that their retirement becomes effective as of July 1, 1945, in accordance with G. L. c. 32, § 4, pars. (1) *b* and (1) *c*.

In accordance with G. L. c. 29, § 31, we understand that they are entitled to full annual salary for their service from September 1, 1944 to June 30, 1945, of which only ten twelfths have been paid. The Deputy Comptroller of the Commonwealth, Mr. A. E. Hoyt, has recommended that the opinion of the Attorney General be secured before payment is made.

Therefore, your opinion is requested in answer to the following questions:

1. Is the Treasurer of the Massachusetts State College authorized by law to pay to teachers retired for superannuation on June 30 the two twelfths of their annual salary normally paid monthly at the end of July and August?

2. If the answer to question 1 is affirmative, must such payment be in lump sum as of June 30?"

I answer both your questions in the affirmative. G. L. (Ter. Ed.) c. 32, § 4 (1) (*b*) and (*c*), reads:

"(*b*) Except as otherwise provided in paragraph (1) (*c*), a member shall be retired for superannuation upon attaining age seventy; and on and after January first, nineteen hundred and forty, a member classified in Group 1 as set forth in paragraph (14) of section two shall be so retired upon attaining age sixty-five.

(*c*) A member, regardless of his official classification, employed in a school or college in the department of education and acting as an instructor or supervisor of instruction of classes conducted during a school year or term, shall be retired on the first day of July next following the date on which age seventy is attained, but any such member attaining said age in July, August or September shall thereupon be retired."

The Massachusetts State College is in the Department of Education (G. L. (Ter. Ed.) c. 15, § 20) and the teachers to whom you refer were, I assume from the context of your communication, such instructors as are mentioned in said section 20 and consequently under the provisions of said section 20, having reached the age of seventy during the past school year, must be retired on July first.

The said teachers were entitled to an *annual salary* for regular service rendered from September 1, 1944, to June 30, 1945, based upon service rendered "for the number of weeks established by the department for

such school to be in session," as set forth in said G. L. (Ter. Ed.) c. 29, § 31, and I assume from the facts as you have stated them in your communication that the service of these teachers between September first and July first had been for such number of weeks. It is provided in said section 31 that "notwithstanding" the general regulation established by the first sentence of said section 31 salaries paid on the first of the month "shall be in full for all services rendered to the commonwealth," with respect to the salary of a teacher in a school or college within the Department of Education:

"the annual salary of each teacher . . . whose regular service is rendered from September first to June thirtieth, shall be for his service for the number of weeks established by the department for such school to be in session during said period, payable, however, in equal instalments on the first day of each month, *and the amount earned and unpaid at the time of his . . . retirement . . . shall be paid forthwith to the persons entitled thereto . . .*"

The words "school" and "college" as used in the quoted provisions of said section 31 are employed by the Legislature as virtually synonymous.

The amount earned and unpaid to the teachers in question on July first is two twelfths of their annual salary, and upon their retirement on that day such earned and unpaid amount is to be paid to them forthwith under the provisions of said G. L. (Ter. Ed.) c. 29, § 31.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Metropolitan District Commission — City of Newton — Metropolitan Water System.

JULY 16, 1945.

MR. NELSON CURTIS, *Secretary, Metropolitan District Commission.*

DEAR SIR: Replying to your inquiry of May 17 relative to the matter of the assessment on the city of Newton for water, I understand the facts to be as follows:

1. The city of Newton has been a member of the Metropolitan Water District since some time prior to 1932 but did not make application to the Metropolitan District Commission for water until 1944, the date when the city became a member subject to full assessment being June 9, 1944.

2. From the date when it first became a member until said June 9, the city of Newton has paid an assessment based upon one fifth of its total valuation under G. L. (Ter. Ed.) c. 92, § 26.

3. The city of Newton still receives some water from other than Metropolitan Water sources.

4. On October 12, 1900, the city of Newton deeded to the Commonwealth for the use of the Metropolitan Water Board, of which the Metropolitan District Commission is the successor, certain premises containing a reservoir, and the deed contains the following paragraph:

"It is understood and agreed that the covered reservoir situate northeasterly from the granted premises will be allowed by the grantee to overflow into the reservoir upon the granted premises as at present; and that the Metropolitan Water Board will, until such time as the city of Newton obtains a regular supply from the Metropolitan Water Works, furnish

water to the city of Newton free from charge in all cases of emergency except a deficiency in the capacity of the sources of supply, and in each year a total quantity of water equal to the contents of the reservoir upon the granted premises."

5. The capacity of the reservoir referred to in the passage above quoted is found by the chief water supply engineer of the Metropolitan District Commission to be 13,500,000 gallons. Of this amount, said engineer finds that the city of Newton used 11,025,000 gallons in 1944, prior to June 9.

6. On April 18, 1945, under G. L. (Ter. Ed.) c. 92, § 26, as then most recently amended by St. 1943, c. 543, the State Treasurer tentatively computed a charge of $79 per million for 85,205,000 gallons of water furnished by the District to Newton in 1944 amounting to $6,731.20, plus an amount of $26,184.06 computed at 3/200 of 1% as $26,184.06, making a total assessment of $32,915.26. The city of Newton has called attention to the fact that in this calculation was included as having been furnished by the Metropolitan District to the city of Newton, 11,025,000 gallons of water which the city received prior to June 9, 1944 and to which it was entitled under the deed containing the passage quoted under 4 above. The total assessment, as claimed by the city of Newton, should be $32,044.28.

Upon the foregoing facts, the question is, whether said amount of 11,025,000 gallons of water, to which the city of Newton was entitled under the contract contained in its deed, can properly be included in the computation of water furnished by the Metropolitan District to said city for the purpose of determining the assessment.

This question arose before the passage of St. 1945, c. 587 and therefore turns upon the construction of G. L. (Ter. Ed.) c. 92, § 26, as amended by St. 1943, c. 543, § 2. The pertinent provisions of said section read as follows:

"The state treasurer, for the purpose of making the apportionment to the towns in the metropolitan water district of the amount required in each year to pay the interest, sinking fund requirements and expenses of maintenance and operation of the metropolitan water system, shall, in each year, apportion such amount to the towns in said district, one third in proportion to their valuations, and the remaining two thirds in proportion to their consumption, in the preceding year, of water received from all sources of supply as determined by the commission and certified to said state treasurer;" (proviso as to one fifth valuation, now inapplicable, omitted) "provided, further, that the assessment of any town assessed upon its full valuation, which obtains a part of its water supply from other than district sources, shall not exceed, by more than three two hundredths of one per cent of such valuation, the product of the total number of million gallons of water supplied to said town in the preceding year from the metropolitan water system by a cost per million gallons equal to forty dollars plus the product of twenty dollars by the ratio of the town's valuation to the aggregate valuation of all members of the district and by the inverse ratio of the town's total water consumption to the aggregate consumption of all members in the preceding year."

The question is, in substance, whether, under the foregoing language, the 11,025,000 gallons which the city of Newton received prior to June 9, 1944, can properly be included in the "total number of million gallons of water supplied to said town in the preceding year from the metropolitan

water system." In my opinion, water to which the town was entitled free of charge under the terms of the deed of October 12, 1900, when furnished prior to June 9, 1944, cannot be included in computing the amount "supplied" by the Metropolitan Water system to the city in 1944. The word "supply" in its context means supplied under chapter 92 of the General Laws to a member city or town, which is obtaining its water supply in part from the Metropolitan Water system and in part from other sources, and does not apply to water to which the city was entitled under a contract in force prior to its application for water to the Metropolitan District Commission. This is a case where the literal construction of the words must be governed by the intent, which is apparent from the section as a whole. The contract with the city of Newton was made in 1900 and continued in force until June 9, 1944. The language of the statute became law in 1943. While it may not be unconstitutional for a state to repudiate a contract with a city or town, such repudiation is not likely to be inferred if the language of the statute is capable of a different construction. Furthermore, the common sense of the section indicates that it was not intended to make a town pay for water to which it was already entitled. The intent is further shown by the following provision immediately succeeding the passage above quoted, showing that a town newly admitted to the Metropolitan Water District would not be charged for any water received before its admission in computing its assessment for the next year:

"If any town is admitted to the metropolitan water district too late in any year to share with the other members the total district assessment for that year, it shall be assessed and pay as a part of its assessment for the following year a sum equal to the product of the total number of million gallons of water furnished it by the district during the balance of the year of its admission by a cost per million gallons equal to forty dollars plus the product of twenty dollars by the ratio of the town's valuation to the aggregate valuation of all members of the district and by the inverse ratio of the town's total water consumption to the aggregate consumption of all members in the preceding year."

Also the deed, quoted under 4 above, carefully distinguishes between a regular supply from the Metropolitan Water works and water furnished under the deed.

You are accordingly advised that the assessment upon the city of Newton for 1945 under G. L. (Ter. Ed.) c. 92, § 26, as amended by St. 1943, c. 543, § 2, should have been $32,044.28 and not $32,915 26.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Contract — Appropriation — Ordinary Maintenance.

JULY 26, 1945.

Hon. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — In a recent communication you have called my attention to G. L. (Ter. Ed.) c. 29, § 13, which reads as follows:

"An unexpended balance of an appropriation for ordinary maintenance of any fiscal year may be applied in the succeeding fiscal year to the pay-

ment of expenses incurred during the fiscal year for which the appropriation was made; but any balance then remaining shall revert to the commonwealth."

In connection with this section and in relation to contracts entered into by your department, for the payment of which provision was originally made by the Legislature through its appropriation to your department for ordinary maintenance, you have asked my opinion upon the following questions:

"1. Does a contractual obligation of this department, the cost of which is paid from the appropriation items above referred to, become an obligation for the full amount of the contract against the appropriation of the fiscal year in which the contract is made?

2. May the unpaid balance of a contractual obligation referred to in question one be paid from the appropriations covering work in succeeding years?"

I answer both these questions in the affirmative. By including a sufficiently large sum in a department's budget from year to year for ordinary maintenance, a commissioner may always have available, if the Legislature appropriates according to such budget recommendations, adequate funds to meet old contractual liabilities when they become payable, irrespective of the disposition of unexpended balances provided for in said section 13.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Corporation — Fee for Increase of Capital Stock.

AUG. 3, 1945.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion as to the fee to be charged to a corporation under G. L. (Ter. Ed.) c. 156, § 54, wherein an amendment was filed by a corporation to increase its authorized capital stock by (*a*) 30,000 shares of convertible preferred stock of the par value of $50 each; and (*b*) 500,000 shares of common stock of the par value of $1 each, and to decrease the authorized capital by 55,000 Class B shares without par value; 275,000 of the newly authorized 500,000 shares of common stock of $1 par value being exchanged for the 55,000 Class B shares already mentioned; the Class B shares to be cancelled.

In computing the fee, your office allowed for the 275,000 shares of common stock of $1 par value which is being used to retire the 55,000 shares of Class B stock. An examination of G. L. (Ter. Ed.) c. 156, § 54, indicates that there is no provision in the statute with reference to the fees for filing a certificate providing for a change of shares without par value to shares with par value.

It is conceivable to think of other situations which are not expressly provided for by the aforementioned section 54. However, undoubtedly the Legislature intended that there should be an additional charge when there was a capital increase.

In the issue at bar, the total amount of the capital increase is two million dollars, but there was also a decrease by the retirement of the 55,000 Class B shares without par value on which the corporation had already

paid a fee of $550. It, therefore, would seem that the sum of $450 would take care of the net capital increase of the corporation. *Commonwealth* v. *United States Worsted Company*, 220 Mass. 183.

In my opinion, the Legislature intended that a corporation should pay a fee for filing a certificate providing for the *net* increase in capital stock. Therefore, an appropriate refund should be made to the corporation.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Resident — Domicile — Bonus — Veteran.

AUG. 7, 1945.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You have asked my opinion in connection with the performance of your duties arising under St. 1945, c. 731, as to whether the word "resident," as employed by the Legislature in section 1 of said chapter 731, is to be construed as meaning "domicile."

I answer your inquiry in the negative.

Said section 1 requires the payment, upon application, of the sum of one hundred dollars to certain veterans of World War II. This requirement has the following proviso which, in its material parts, reads:

"provided, that every person on account of whose service the application is filed shall have been a resident of the commonwealth for a period of not less than six months immediately prior to the time of his entry into service . . ."

The words "domicile" and "residence" are not necessarily synonymous (*Marlborough* v. *Lynn*, 275 Mass. 394, 397). A person's residence is that place wherein he is personally staying at some place of abode *with no present intention to remove therefrom. Cambridge* v. *West Springfield*, 303 Mass. 63, 67. The Legislature, by the use of the phrase "a resident of the commonwealth for a period of not less than six months," has plainly indicated an intent to designate one who has had such a place of abode *of expected permanency* in this Commonwealth throughout a period of six months immediately before his entry into the armed forces of the United States, irrespective of where such person's "domicile" may have been.

I have returned photostatic copy of said chapter 731, which you forwarded to me.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Bridges — Through Routes — Construction of St. 1945, c. 690.

AUG. 10, 1945.

Hon. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — You have asked me three questions with relation to the construction of St. 1945, c. 690, in connection with a certain map referred to therein.

The pertinent part of section 1 of said chapter 690 provides that the care, control and maintenance of every public highway bridge of a certain designated span "located on a through route" are transferred to the

Department of Public Works and, on January 1, 1946, such bridge shall become a state highway.

The section sets forth that:

"a through route is defined to be any route shown on a map entitled 'Route Map of Massachusetts, 1941', published by the Massachusetts department of public works, including the insert maps on the reverse side thereof, in whatever form such route is indicated."

You have laid before me a copy of the map referred to in said section.

Said section refers to "routes" only as shown on said map. It does not refer to roads as such shown on the map. The phrase "in whatever form such route is indicated" does not bring within the definition of route any ways appearing on said map which are not shown thereon as "routes."

The map itself shows some ways in red and some in black. The legend upon the map explains such ways by referring to "numbered routes red." No other "routes," except those ways printed, are referred to in the legend as being upon the map. The other ways thereon which are printed in black are referred to in the legend as "connecting roads."

Your first question reads:

"Does that part of section 1 relative to the definition of routes include all routes and roads designated on the map under the title 'Legend' as numbered routes in 'red' and connecting roads in 'black'?"

The definition of routes above quoted does not embrace any way except such as is a "route shown on a map . . . in whatever form such route is indicated." Reading the map in connection with the legend thereon, it is apparent that the ways shown in black are not "routes" and do not purport to be "routes" indicated in a peculiar form. The only ways indicated on the map as "routes" are those printed in red.

Accordingly, I answer your first question in the negative.

The ways shown in various municipalities on the back of the map contain no legend but it would appear from their design that those ways which are "routes" are shown by heavy black lines and municipal streets not routes are indicated by a lighter color.

I therefore answer your second question in the negative.

Your third question relates to section 5 of said chapter 690, which reads:

"Nothing in this act shall affect existing agreements, decrees, orders or statutes defining the duties, responsibilities or obligations of railroad companies or other public utilities relative to any such bridge so made a state highway or transferred to the control of the metropolitan district commission."

Your question reads:

"Are the obligations of all municipalities, counties, or public authority appearing in agreements, decrees, orders or statutes with railroad companies or public utilities transferred to the Department of Public Works?"

I answer this question to the effect that, since the control of certain bridges has been vested in your department by section 1 of said chapter, the duty of enforcing the obligations of railroad companies or public utilities in respect to such bridges now rests upon your department.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Milk Control Board — Deductions of Assessments paid by Milk Dealers from Amounts due from Producers.

Aug. 13, 1945.

Milk Control Board.

Gentlemen: — You have asked my opinion on the following questions relative to deductions of assessments paid by milk dealers from amounts due from them to producers:

"(1) With respect to milk dealers who pay their producers only the *minimum* prices required by orders of the Board, — do the provisions of said paragraph (*b*) of section 9 (*a*) require, or (*b*) authorize, the Board to disallow any deductions made by such milk dealers from such minimum prices on account of assessments paid under paragraph (*a*) of said section 9, unless such assessments are paid to the Milk Control Board on or before the tenth day of the month, for the milk handled by the milk dealer, in the manner set forth in said paragraph (*a*), during the preceding month?

(2) With respect to milk dealers who pay their producers *in excess of* the minimum prices required by orders of the Board, — do the provisions of said paragraph (*b*) of section 9 (*a*) require, or (*b*) authorize, the Board to disallow deductions (not exceeding in amount the dealer's payment in excess of the minimum) made by such milk dealers from such prices in excess of the minimum, on account of assessments paid under paragraph (*a*) of said section 9, where such assessments are not paid to the Milk Control Board on or before the tenth day of the month for the milk handled by the milk dealer, in the manner set forth in said paragraph (*a*), during the preceding month?

(3) Would the answer to the foregoing question numbered (2) differ depending on whether the price paid by the milk dealer in excess of the minimum, was (*a*) a price required to be paid by the dealer under the terms of a contract between him and the producer, or (*b*) a price announced or established by the dealer as his producer payment price, on the basis of which he was making settlement to producers for milk delivered during the particular delivery period in question?"

I answer your first two questions to the effect that the Milk Control Board is required to disallow the deductions referred to in each of these questions.

I answer your third question to the effect that the Milk Control Board is required to disallow deduction in both the instances referred to in this question.

G. L. (Ter. Ed.) c. 94A, § 9 (*b*) provides:

"One half of any such payment made by any milk dealer on or before the tenth day of the month in which such payment is due, on account of milk sold or distributed by him in the highest use classification from time to time determined by the board for such market or markets, may be deducted rateably by him from amounts due from him to producers for such milk."

It appears from the language of this section that the deduction is permissible only if the assessment payment is made by the milk dealer on or before the tenth of the month. Such payment was apparently intended by the Legislature to be a condition precedent to the taking of the deduction.

With reference to the deduction in cases where the price paid by the milk dealer to the producer is higher than the minimum price, there is no language in the statute indicating a legislative intent that the deduction should be taken from the minimum price established by the board, rather than from the amounts due from the dealer to the producer for milk sold at a price above such minimum. The deduction therefor may be taken from any amounts that are due and the fact that the amounts which are due are based on a price higher than the minimum established by the board does not change the authorization of the statute in this respect.

Where the price paid to producers is not based on a contract between the dealer and the producer, but is higher than the minimum price established by the board, it would seem that the dealer has chosen this price voluntarily and it becomes the basis upon which the amount due to the producer is determined, so that deductions should be authorized only for assessments paid by the dealer on or before the tenth of each month from any amount due the producers based on the higher price.

I appreciate the difficulties that are being encountered by some dealers, due to wartime conditions, in complying with the statutory requirements of payment on or before the tenth of the month, and the persuasiveness of the dealers' contention with reference to deductions in cases where the prices paid by dealers to producers are higher than the minimum price established by the Board.

If it is felt that payment of the assessment on or before the tenth of the month and the disallowance by the board of the deductions herein discussed are not practical and impose undue hardships, they may be made the subject of a request to the Legislature for change by amendment to the statute. These hardships, however, can be avoided if the dealer should deposit with the Milk Control Board a sufficient sum to cover the assessment due on the approximate maximum monthly business, or pay to the Milk Control Board on or before the tenth of the month a sum of money which will be sufficient to cover the amount of any assessment that may subsequently be determined to be due for the preceding month.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Resident — Veteran — Bonus — Evidence.

AUG. 21, 1945.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You have called my attention to St. 1945, c. 731, § 4, commonly called the bonus bill, which reads in part:

"The state treasurer may accept the written statement of an assessor of a city or town that a person claiming pay or on whose account pay is claimed by a dependent or heir-at-law, . . . was a resident thereof on the first day of January, in any year . . ."

You have asked my opinion as to whether an assessor may delegate to a deputy or other person authority to make the "written statement of an assessor" mentioned in said section 4.

I am of the opinion that he may not properly do so and that such a statement made by some one other than an assessor himself is not the

"written statement" mentioned in said section, and is not one which the State Treasurer may accept "as prima facie evidence" of the fact of residence under the provisions of said section.

The duty of making a "written statement" as to residence which may be given the force of "prima facie evidence" has been placed by the Legislature upon assessors personally. The nature of such a statement as "prima facie evidence" appears to have been considered by the Legislature as based upon the official position of assessor of the one making it. Such duty is, therefore, not of a kind the performance of which may be delegated by an assessor to someone else.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Bonus — Veteran — United States Coast Guard Reserve.

AUG. 27, 1945.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You have sent me the following communication:

"I wish to request your opinion as to whether or not, under the provisions of St. 1945, c. 731, it is legal for the State Treasurer to pay the so-called Massachusetts state bonus to men who have served in the United States Coast Guard Reserve."

I am of the opinion that you may pay the "bonus," so called, under the provisions of St. 1945, c. 731, to men who have served in the United States Coast Guard Reserve and possess the necessary qualifications set forth in said chapter.

Section 1 of said chapter 731 provides for the payment of a sum of money from the treasury of the Commonwealth without appropriation to each person who "shall have served in the armed forces of the United States on or after September sixteenth, nineteen hundred and forty and prior to the termination of the present war, as declared by presidential proclamation or concurrent resolution of the congress," with certain qualifications which do not require to be dwelt upon here.

Section 2 of said chapter 731 reads:

"The words 'armed forces', as used in this act, shall mean the following: — United States Army, Army of the United States, United States Navy, United States Naval Reserve, United States Marine Corps, United States Marine Corps Reserve, United States Coast Guard, Women's Army Corps, Women's Auxiliary — Navy, Women's Auxiliary — United States Marine Corps, Women's Auxiliary — United States Coast Guard, Army Nurse Corps and Navy Nurse Corps."

Although the United States Coast Guard Reserve is not specifically mentioned in said section 2, yet the United States Coast Guard is named therein and the United States Coast Guard Reserve has been established by Congress as "a component part of the (said) coast guard" (U. S. C. A., Title 14, §§ 301, 302, as amended), and its members may be ordered to active duty in time of war (§ 305). Moreover, the Coast Guard, of which the Coast Guard Reserve is a "component part," operates as a part of the navy in time of war (U. S. C. A., Title 14, § 1, as amended). It fol-

lows that in time of war a member of the Coast Guard Reserve is a member of the Coast Guard and, as was said in *Petition of Delgado*, 57 F. Supp. 460, 462, is "serving . . . in the naval forces of the United States." See *Brown* v. *Cain*, 56 F. Supp. 56, 58.

In view of the foregoing considerations, it seems apparent that the words "United States Coast Guard," as used by the Legislature in said section 2, comprehend within their sweep the "United States Coast Guard Reserve," and the fact that the said "reserve" was not specifically mentioned by name in said section 2 does not under the circumstances indicate a legislative intent to exclude the members of the United States Coast Guard Reserve from recognition under the terms of the said chapter as persons who "have served in the armed forces of the United States during the present war" as expressed in the title of the chapter.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Statute — Termination — Conclusion of Existing State of War.

AUG. 27, 1945.

Hon. THOMAS H. BUCKLEY, *Chairman, Commission on Administration and Finance.*

DEAR SIR: — I am in receipt from you of the following letter:

"Will you, at your convenience, kindly submit to this Commission your ruling in regard to the termination of chapter 16 of the Acts of 1942, (Spec. Sess.), relative to employment of certain employees of the Commonwealth."

The Attorney General, following a long line of practice and procedure of this department, does not give general rulings or opinions upon the construction of statutes. He confines his opinions upon questions of law to matters which are presently before an officer of the Commonwealth for the performance of some duty upon the part of such officer.

For your guidance, however, let me say that the termination of St. 1942 (Spec. Sess.), c. 16, is provided for in section 3 of said chapter as follows:

"This act shall remain in effect during the continuance of the existing state of war between the United States and any foreign country, and employments hereunder shall not extend beyond the effective period of this act."

The conclusion of "the existing state of war" referred to in said section 3 will not occur until the end of such state of war is declared by Congress or by proclamation of the President, acting under authority of Congress. Until such declaration is so made, said chapter 16 by the terms of said section 3 still remains in effect. When such declaration is so made, the effective period of said chapter 16 will be at an end.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veteran — "Existing State of War" — Allowances for Dependent Relatives.

Sept. 5, 1945.

Hon. Francis X. Cotter, *Commissioner of Veterans Aid and Pensions.*

Dear Sir: — In a recent communication you have asked my opinion as follows:

"Your opinion is requested as to whether or not we can assist the dependents of those men who have been, or will be, inducted since hostilities ceased on August 16th, and with the declaration of V-J Day, September 2d."

"The continuance of the existing state of war between the United States and any foreign country and for six months thereafter" is set by St. 1942 (Spec. Sess.), c. 11, § 1, as the period during which an "allowance for the dependent relatives of any soldier or sailor" may be given.

"The existing state of war," referred to in said section 1, will continue until the end of such "state of war" is declared by Congress or by proclamation of the President, acting under authority of Congress.

The Legislature in said chapter 11 did not set up a specific date as the day upon which such aid should terminate nor upon which the "existing state of war" should be taken to have ended, as it did with relation to aid furnished by virtue of service in the first World War (see G. L. (Ter. Ed.) c. 115, § 6).

Accordingly, I answer your inquiry to the effect that assistance may be given under St. 1942 (Spec. Sess.), c. 11, § 1, to dependents of soldiers and sailors inducted into service before such declaration by Congress or, such proclamation of the President, acting under authority of Congress, irrespective of events of August 16th or of V-J Day, September 2, 1945, since no declaration of the end of the "state of war" existing when said chapter 11 was enacted has been declared by Congress or by the President under its authority.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Governor and Council — Discretion as to Disapproval of Certain Items in Warrants — Legislative Declarations.

Sept. 5, 1945.

To His Excellency the Governor and the Honorable Council.

Gentlemen: — You have laid before me chapters 42 and 53 of the Resolves of 1945, being respectively a "Resolve in favor of Guy Marvel of Petersham" and a "Resolve in favor of Mary L. D'Amore of Malden," providing for the payment to said Marvel of $4,166.16 and to the said D'Amore, as assignee of D'Amore Construction Co., Inc., of $48,000.

With relation to said chapters you have asked my opinion in the following terms:

"The Governor and Council respectfully requests an opinion as to whether or not upon the presentation of the warrants, containing these items, submitted to them for approval, they may exercise any discretion in disapproving said items in the absence of fraud or other irregularity."

It is set forth in said chapter 42 that the payment to said Marvel is "in full payment of the claim of said Marvel against the commonwealth for the loss of business alleged to have been caused by certain work performed by the metropolitan district water supply commission."

It is set forth in said chapter 53 that the payment to said D'Amore, assignee, represents "the loss suffered" by her assignee, D'Amore Construction Company, Inc., "by reason of delays required by officials of the commonwealth making impossible the carrying out of certain contracts entered into with said company relative to alterations to the boiler house, and new office building, at the Boston state hospital and resulting in the inability of said company during said period to use for any other purposes certain compressors, . . . and requiring said company to keep on the premises at its expense certain watchmen and superintendent. . . ."

A legislative declaration that such payments are authorized by it "for the purpose of discharging a moral obligation of the commonwealth and promoting the public good" appears in each of said chapters.

In view of such legislative declarations and the enactment of said chapters with the approval of the Governor, the Governor and Council may not now properly exercise "discretion in disapproving" items for the payments provided for by the General Court in said chapters, now appearing in warrants presented to you by the Comptroller.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Unemployment Compensation— Agreements with Federal Government.

SEPT. 5, 1945.

His Excellency, MAURICE J. TOBIN, *Governor of the Commonwealth.*

SIR: — The telegram of Senator Walter F. George, dated September 3, 1945, as construed by me, poses two questions which follow, and I advise that these questions be answered as indicated:

1. Can Massachusetts enter into an agreement with the Federal Government without such agreement resulting in State payments under unemployment compensation being partially or totally reduced by the amount of Federal supplement?

The answer to this question is in the negative, under G. L. (Ter. Ed.) c. 151A, § 66.

This section authorizes the Director of the Division of Employment Security to enter into reciprocal agreements with appropriate and duly authorized agents of other States or the Federal Government, or both, to administer their unemployment compensation laws within the territorial jurisdiction of the agent State. There is no other provision in the State law which permits the administrative agency to make agreements with other State or Federal agencies for any other purpose. If the proposal here under consideration is not a Federal Unemployment Compensation Act but merely a subsidiary provision to permit further payments under the State law, then it is quite clear that the administrative agency has no power to enter into such an agreement. If the proposal constitutes a Federal Unemployment Compensation Act, then the Director has no authority to enter into an agreement which will change the benefit schedules provided by St. 1945, c. 484.

2. If no agreement is entered into between Massachusetts and the Federal Government, will the Federal supplement payments result in reduction of the amount paid by the State?

The answer to this question is in the affirmative, under G. L. (Ter. Ed.) c. 151A, § 26.

This section provides that no benefits shall be paid under this chapter to an individual for any week with respect to which, or a part of which, he has received or is seeking unemployment benefits under unemployment compensation law or unemployment security law of any other State or of the United States. It therefore follows that if a person receives payments from the Federal Government, he is not eligible to receive payments under the Massachusetts Unemployment Compensation Law.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Commissioner of Agriculture — Chairman of Milk Control Board — Incompatibility of Offices.

SEPT. 10, 1945.

Hon. FREDERICK E. COLE, *Commissioner of Agriculture.*

DEAR SIR: — I am in receipt of the following communication from you:

"I request your opinion upon the following question:

Is the present Commissioner of Agriculture disqualified by the provisions of St. 1945, c. 497, § 2, from holding the office of chairman of the Milk Control Board by an appointment for three months only, during a leave of absence without pay from his office as such commissioner given him by the Governor for the purpose of having him serve as such chairman temporarily for three months?"

I answer your question in the affirmative.

St. 1945, c. 497, § 2, in its pertinent parts reads:

"The milk control board . . . shall continue in existence with the same membership, powers and duties, *except that the commissioner of agriculture shall, upon said effective date* (of the act) *cease to be a member of said board* and that the governor . . . shall as soon as practicable . . . appoint one additional member of said board for a term expiring on September thirtieth, nineteen hundred and forty-eight and shall thereupon designate one of the members of said board as chairman thereof."

It is further provided in section 1 of said chapter 497 that the chairman so designated is to receive a salary of six thousand dollars and expenses and is *to devote his whole time to the duties of such office.*

Said chapter 497 contains an emergency preamble. It was approved by the Governor on June 28, 1945. This law was not suspended by a referendum petition under Const. Amend. XLVIII, The Referendum, III, § 3, and is consequently in effect.

Prior to the enactment of said chapter 497 the Commissioner of Agriculture was *ex officio* a member and chairman of the Milk Control Board, serving without compensation (G. L. (Ter. Ed.) c. 20, § 7).

It would appear from the provisions of said chapter 497 that it was the intent of the Legislature to provide not only that the then Commissioner of Agriculture should cease to be a member of the Milk Control Board

and that the place so left vacant was to be filled by the Governor's appointment for a term of years of some person other than a commissioner of agriculture, but also that the Governor was to designate a chairman of said board from among the two remaining members and such newly appointed person. In other words, it would seem to have been the intent of the Legislature to disqualify any holder of the office of such commissioner from becoming a member of the Milk Control Board and consequently from being made its chairman.

The Legislature has, unless there be constitutional provisions preventing, which do not exist with relation to the offices now under consideration, the same right to provide disqualifications that it has to provide qualifications for office. *Nichols* v. *Commissioner of Public Welfare*, 311 Mass. 125, 130; *Opinion of the Justices*, 240 Mass. 611, 613, 615.

An officer of the Commonwealth may be excluded by the Legislature from eligibility for an office other than that which he already holds and such a disqualification will prevent his becoming the incumbent of such other office in addition to the one which he already occupies. A commissioner of agriculture does not cease to hold such office because he is given a leave of absence without pay and the fact of such leave does not remove the disqualification which the Legislature has placed upon his holding the office of a member or chairman of the Milk Control Board.

Such disqualification applies equally to an appointment for three months, if there be authority to appoint for any such period, as to an appointment for a term prescribed by said chapter 497.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Veterans — Residents — Tuition.

SEPT. 10, 1945.

His Excellency, MAURICE J. TOBIN, *Governor of the Commonwealth.*

SIR: — Your Excellency has asked my opinion with relation to three questions addressed to you in a communication from the manager of the Providence office of the United States Veterans Administration so that you may answer such communication. These questions are as follows:

"(1) May the proper authorities of any institution maintained in whole or in part by public funds charge a higher rate of tuition to vocationally handicapped veterans who are entitled to the benefits of Public Law 16, 78th Congress, than is charged to other resident students similarly circumstanced who are not veterans?

(2) If the answer to question number (1) is in the affirmative, what standards are to be applied in determining the cost of such tuition?

(3) If the answer to question number (1) is in the negative, what action by the Veterans Administration, if any, is required in order that such public institutions may accept such veterans for education or training therein?"

1. The answer to the first question should be in the negative. However, for the purpose of applying tuition rates, only those veterans are to be regarded as "residents" of Massachusetts who have their permanent homes within the Commonwealth. Persons who have their domiciles or permanent homes outside Massachusetts are not to be regarded as "resi-

dents" merely because of their sojourn at an institution of learning in the Commonwealth from which they presently intend to depart when their instruction is finished.

2. In view of this answer to the first question, no answer is required to the second question.

3. While it is not for the officers of the Commonwealth to advise the Veterans Administration as to what action they shall take in regard to making contracts for education of veterans such as are referred to in the third question, in reply to this question it may be said that if this opinion of the Attorney General is sent to the heads of the offices of those State institutions with which the Veterans Administration desires to contract, such officers in the performance of their duties will be required by you to comply with the opinion expressed by the Attorney General herein.

Irrespective of such specific authorization as may have been given by the Administrator of Veterans Affairs "to make non-resident tuition charges for resident veterans attending institutions under the provisions of Public Law 346, 78th Congress," to which reference is made in the said communication to you, if such an authorization has not been given so as to include veterans attending institutions for "vocational rehabilitation" under the terms of Public Law 16, 78th Congress, the charging of non-resident rates for the tuition of veterans who are in fact residents of Massachusetts because of tuition sought for purposes of such "vocational rehabilitation" under said Public Law 16 is not authorized under the laws of the Commonwealth.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veteran — Resident — Settlement.

SEPT. 10, 1945.

Hon. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — I am in receipt from you of the following communication:

"One Robert Baxter was admitted to the West Department, Massachusetts Memorial Hospital, on April 10, 1944 and discharged May 17, 1944.

He was born in Cambridge, Massachusetts, September 8, 1938. Parents, Robert F. Baxter and Marjorie Morley; both born Boston, Massachusetts.

This family was aided by the Department of Public Welfare of Cambridge, Massachusetts, March 24, 1941, as an unsettled case, and the Commonwealth paid the bill.

On the above admission to the hospital Cambridge notified the Commonwealth on April 17, 1944, and has billed the Commonwealth for his care.

We find that patient's father, Robert F. Baxter, enlisted from Cambridge, Massachusetts, October 27, 1942, Draft Board No. 46, and was still overseas late in 1944.

What is the settlement status of Robert F. Baxter on April 10, 1944, taking into consideration Executive Order No. 32, and the Attorney General's opinion dated May 9, 1945?"

You have not informed me whether it is a fact that the said Robert F. Baxter had a permanent home in Cambridge at the time of his enlist-

ment. If he did have, he "resided" in Cambridge at such time, in the sense in which the word "resided" is used in Executive Order No. 32 and in G. L. (Ter. Ed.) c. 116, § 1, par. 6, as amended by St. 1943, c. 455, § 13, and by force of said order and said chapter 116 he is deemed to have a settlement in said Cambridge, the place of his enlistment. His minor child also by force of said Executive Order No. 32 and said chapter 116, section 1, as amended, is deemed to have a settlement in such place of enlistment, Cambridge.

Since it does not appear from any facts of which you have advised me that said Baxter has been proved guilty of wilful desertion or left the United States service without an honorable discharge or release, his settlement is his place of enlistment on April 10, 1944, namely, Cambridge (see opinion of the Attorney General to the Commissioner of Public Welfare, May 9, 1945).

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Employees of Metropolitan District Water Supply Commission doing Work under St. 1945, c. 705.

SEPT. 12, 1945.

MR. WILLIAM B. MORRISSEY, *Chairman, Metropolitan District Water Supply Commission.*

DEAR SIR: — In a recent letter you have requested my opinion as to whether or not the work provided for in St. 1945, c. 705, may be carried on by employees who have not been qualified under civil service.

Your commission was established by St. 1926, c. 375, in section 2 of which act it was provided:

". . . The commission may appoint and in its discretion remove such engineering, legal, clerical and other assistants as it may deem necessary to carry on the work herein authorized, and may fix their compensation in accordance with such rules and regulations as the commission may establish and as shall be approved by the governor and council. Such appointments shall not be subject to classification under sections forty-five to fifty, inclusive, of chapter thirty of the General Laws, and chapter thirty-one of the General Laws shall not apply to removals, and, in accordance with such regulations as the commission may establish and as shall be approved by the governor and council, any appointment, including that of the chief engineer, may be wholly exempt from said chapter thirty-one. Upon request of the commission, the division of civil service shall hold special examinations."

St. 1927, c. 111, in extending the powers of your commission and diverting a water supply from the headwaters of the Sudbury River, provided in section 2 as follows:

"In constructing the works herein authorized, the metropolitan district water supply commission shall proceed with the organization and in the manner provided by said chapter three hundred and seventy-five for extending the metropolitan water system . . ."

St. 1927, c. 321, further extended the powers of your commission in the Swift River project, so called. This act provided in section 3:

"In constructing the works authorized by this act the metropolitan district water supply commission shall proceed with the organization and in the manner provided by said chapter three hundred and seventy-five. All of the provisions of section two of said chapter three hundred and seventy-five relative to the employment of laborers, workmen and mechanics and relative to the appointment, removal and fixing of compensation of all employees of the commission, including the appointment and removal of a chief engineer, shall apply in carrying out the provisions of this act. None of the employees of the commission, whether appointed before or after the effective date of this act, shall become members of the state retirement system, but those who are members thereof at the time of their employment may be continued therein."

St. 1941, c. 720, provided for sewage disposal needs to be carried out by your commission, and in section 1 of this act it is stated:

". . . Subject to the conditions hereinafter provided, the metropolitan district water supply commission, *enlarged* as hereinbefore provided . . ."

In section 5 of the same act it is provided:

". . . All of the provisions of section two of said chapter three hundred and seventy-five relative to the employment of laborers, workmen and mechanics and relative to the appointment, removal and fixing of compensation of all employees of the said metropolitan district water supply commission, including the appointment and removal of a chief engineer, shall apply in carrying out the provisions of this act. None of the employees of said metropolitan district water supply commission, whether appointed before or after the effective date of this act, shall become members of the state retirement system, but those who are members thereof at the time of their employment may be continued therein. . . ."

This act was repealed by section 14 of your present act, chapter 705.

The present act in question provides in section 1:

". . . Subject to the conditions hereinafter provided, the metropolitan district water supply commission, *enlarged* as hereinbefore provided . . ."

Nothing in the act is said relative to the employment of laborers, workmen or other employees.

In reading all these acts together, and from the fact that the Legislature before passage struck from the present act all provisions regarding civil service, it would appear to be the intent of the General Court as expressed in said chapter 705 that the work provided for therein may be carried on by employees who have not been qualified under civil service.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Milk Control Board — Authority to Make Orders of Curtailment of Deliveries.

SEPT. 21, 1945.

Milk Control Board.

DEAR SIRS: — In a recent letter you have asked my opinion as to the power of your board to make certain suggested orders, curtailing deliveries of milk by retailers to consumers, based upon findings of fact which you assume your board might make after possible further hearings. Inasmuch

as such hearings have not yet been held and the evidence which may be adduced is entirely problematical, your question is purely hypothetical. The Attorney General, following a long line of practice and procedure by this department, does not render opinions upon hypothetical questions.

For your guidance, however, I will say that the supposititious factual findings set forth in your letter do not indicate that such orders as you suggest would be so reasonably adapted to effectuate any of the objects of the Milk Control Law as to be within the authority of the board. While it is conceivable that there might be produced evidence of factual conditions, such, for example, as existed during the national emergency, as would warrant the formulation of orders of the proposed type, nevertheless there are no sufficient assumed facts set forth in your letter to make it reasonable to predicate factual findings thereon which would warrant a conclusion that orders of curtailment based thereon would be said by the courts to be reasonably adapted to accomplish the object of the Milk Control Law and so to be within the power of the board. The board's orders to be within the scope of its authority and so valid, whether dealing with trade practices or other similar activity, must have a reasonable adaptation to the accomplishment of the objects of the said law. *American Can Co.* v. *Milk Control Board*, 316 Mass. 337.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Insurance — Group Life Policy — Foreign Company — Licensed Resident Agent.

SEPT. 21, 1945.

Hon. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — In a recent letter you have informed me that a foreign insurance company which is licensed to transact business in the Commonwealth, including, I assume from the context of your letter, the business of writing insurance upon lives, proposes to insure all the employees, both union and non-union, of the several employer members of an association, under a group life policy issued from one of its offices outside the State to trustees "located outside the Commonwealth." The premiums on the policy are to be paid by the several employers to the trustees, who transmit them to the insurance company, and all insured employees are residents of Massachusetts.

The laws of Massachusetts do not provide for the issuance of such a policy. (See G. L. (Ter. Ed.) c. 175, §§ 133–138, as amended.) You inform me, however, that the laws of the State in which the company proposes to issue the policy provide for a policy of group life insurance covering both union and non-union employees issued to trustees.

With relation to such a foreign insurance company so issuing such a policy, you have asked my opinion upon the following questions:

"1. In view of the provisions of G. L. c. 175, §§ 150 and 163, if a group life insurance policy is issued to a group of Massachusetts residents by a foreign insurance company under the plan outlined above, will the company be violating section 157 of G. L. c. 175 (Resident Agent Law) and will such company be amenable to the punishment specified in said section 157 and to the revocation or suspension of its license as detailed in section 5 of said chapter?

2. Would the issuance of such a policy under the plan outlined above by a foreign insurance company admitted to transact business in the Commonwealth constitute a violation of G. L. c. 175, § 3?"

G. L. (Ter. Ed.) c. 175, § 157, as amended, in its pertinent part provides:

"Foreign companies admitted to do business in the commonwealth shall make contracts of insurance upon lives, property or interests therein, . . . only by lawfully constituted and licensed resident agents therein. . . ."

Said chapter 175, section 150, provides in part:

"Foreign companies, upon complying with the conditions herein set forth applicable to such companies, may be admitted to transact in the commonwealth, as provided in section one hundred and fifty-seven, any kinds of business authorized by this chapter, subject to all general laws . . . relative to insurance companies, and subject to all laws applicable to the transaction of such business by foreign companies and their agents . . ."

Said chapter 175, section 5, as amended, provides that the Commissioner of Insurance may revoke the license of any foreign company if he is satisfied that such company "has violated any provision of law."

I am of the opinion that a foreign insurance company, licensed to do business in the Commonwealth, which issues a policy of group life insurance such as has been described, to trustees outside Massachusetts and, accordingly, not through a licensed agent resident in the Commonwealth, has violated the provisions of said section 157 by not making such policy through a licensed resident agent, and is amenable to the punishment specified in said section 157 for such a violation, and also to the revocation of its license under the provisions of said section 5.

Such a group policy is a contract "of insurance upon lives" as the quoted words are used in said section 157; the lives being those of the employees covered, who are residents of Massachusetts. It is required by the provisions of said section 157, that such a policy shall be made only by a licensed agent resident in the Commonwealth. Since, as has been stated, the particular type of group life policy is not one which may be issued under the provisions of the laws of the Commonwealth, it is, in fact, issued outside Massachusetts and not made through a licensed resident agent, and the provision of said section 157 that contracts of insurance upon lives must be made only by licensed resident agents has been violated.

This provision for the making of contracts only through licensed resident agents is one which the Commonwealth may properly make and is one with which a foreign insurance company must comply in order to do business in Massachusetts. The company's subjection to this requirement of our law is implicit in its acceptance of a license and in its transaction of business thereunder in the Commonwealth, by force of the terms of said sections 150 and 157. The rights of a resident of Massachusetts to insure in whatever State he pleases and the rights of a foreign company *not licensed to do business in the Commonwealth* to issue elsewhere a policy not authorized by our laws to a resident of the Commonwealth are not affected by this principle, which prevents a foreign company from accepting the privilege of doing an insurance business in Massachusetts and then violating the conditions under which the privilege has been extended to it by the Legislature. *Palmetto Fire Ins. Co.* v. *Connecticut*, 9 F. (2d) 202; 272 U. S. 295.

With regard to the second question, in view of my answer to the first there would appear to be no necessity at this time for my rendering an opinion upon this query.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Reformatory for Women — Release on Indenture — Domestic Service.

SEPT. 24, 1945.

Hon. J. PAUL DOYLE, *Commissioner of Correction.*

DEAR SIR: — I am in receipt from you of the following letter:

"I respectfully request your opinion relative to G. L. c. 127, § 85, pertaining to the type of work for which an inmate of the Reformatory for Women may be released on indenture."

G. L. (Ter. Ed.) c. 127, § 85, reads:

"The commissioner may, with the consent of a woman serving a sentence in the reformatory for women or in a jail or house of correction, and with the consent of the county commissioners if she is in a jail or house of correction, *contract to have her employed in domestic service* for such term, not exceeding her term of imprisonment, and upon such conditions, as he considers proper with reference to her welfare and reformation. If in his opinion her conduct at any time during the term of the contract is not good, he may order her to return to the prison from which she was taken."

It is obvious that the authority of the said commissioner to make contracts for the employment of the female prisoners referred to in said section 85 is limited by the terms of the section to the making of contracts for employment in "*domestic service*" only and does not extend to the execution of contracts for employment in forms of labor in any service not comprehended by the words "domestic service."

The word "domestic," as an adjective, in its usual connotation means belonging to a home or household. *Commonwealth* v. *Flynn*, 285 Mass. 136, 139. It is defined in Webster's International Dictionary as "of or pertaining to the household or family." As a noun, it is defined in such dictionary as "one who lives in the family of another."

It is plain that "*domestic service*," as used in said section, means service rendered in or about an employer's house such as is usually necessary or desirable for the maintenance and enjoyment of a home. As so used it does not include service rendered in a store, hotel, mercantile or mechanical establishment, nor in farm labor. See *Toole Furniture Co.* v. *Ellis*, 5 Ga. App. 271; *Barnes* v. *Waterson Hotel Co.*, 196 Ky. 100; *Calto* v. *Plant*, 106 Conn. 236; *Waterhouse* v. *State*, 21 Tex. App. 663.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veteran — Leave of Absence — Step-rate Increments — Accumulated Vacation Time.

Oct. 2, 1945.

Clifton T. Perkins, M.D., *Commissioner of Mental Health.*

Dear Sir: — You have informed me that one Kaye, employed as a steam fireman at the Westboro State Hospital, resigned this position on December 5, 1943, and gave as his reason for resigning that his eyes were being impaired by the character of the work which he was obliged to perform as such fireman; that on February 21, 1944, he was inducted into the United States Army through the draft. You further advise me that said Kaye has recently been discharged from the army and seeks reinstatement in his former position.

In relation to the foregoing facts you have asked my opinion upon the following question:

"Is Mr. Kaye entitled to the benefits under chapter 708, particularly as regards step-rate increases or vacation time?"

You do not state it specifically, but I assume from the tenor of your communication for the purposes of this opinion that said Kaye did not file a written resignation in which he stated that he was leaving his position because of "the fact that firing impaired his eyes," but that he made an oral resignation and afterward entered the military service of the United States. Upon this assumption, said Kaye, under the terms of St. 1941, c. 708, § 1, as amended by St. 1943, c. 548, § 1, is to be deemed to have been upon a leave of absence and to be entitled to his position upon his honorable discharge from the army and, under the provisions of section 24 of said chapter 708, upon his return to his position, he is entitled to the benefit of seniority rights as if his service in such position had not been interrupted and, if his "salary is paid under a classified compensation plan," he is entitled to a salary rate "which includes accrued step-rate increments to which he would have been eligible except for absence on such military . . . service." There is, however, no provision of the statutes which would entitle the said Kaye to any theoretical accumulated vacation time not due him prior to his entrance into the military service.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Administration and Finance — Rules — Interpretations.

Oct. 2, 1945.

His Excellency the Governor and the Honorable Council.

Gentlemen: — You have asked my opinion in a recent communication, with particular relation to "Vacation Rules of the Commission on Administration and Finance," "approved by the Governor and Council on April 14, 1943," as to whether or not it (the Governor and Council) "has authority to interpret rules."

An interpretation of existing administrative rules either by the officers who made such rules or by the officers who approved them, not made in passing upon any specific matter coming before them for official action, has no particular force as a matter of law, though such a preliminary in-

terpretation may be of practical assistance as an attempt to inform those interested as to the views of such officers on the construction of the rules. It is only when in the performance of their duties that officers have to make application of the rules to particular matters actually coming before them for determination that the construction of rules becomes of vital importance. In so far as a preliminary interpretation of a rule was correct, it would be proper to follow it in making such a determination; in so far as it was not correct, it would not be proper to follow it. The act of making the preliminary interpretation does not give to such interpretation any finality or any indelible mark of correctness. The propriety of any construction of a rule when made by an officer or board in determining a matter in controversy may be a question for judicial decision when the rights of an employee or other person are concerned.

In other words, the making of general interpretations of rules in advance of actual determinations of causes is for the convenience of those interested but without any legal force or effect. It would seem, therefore, proper for a rule-making body, or for a body required to approve rules, to make general interpretations of rules in advance of determinations of particular matters for the purpose of enlightening persons concerned with such rules as to the views of public officers with regard to the meaning of the rules for what such views may be worth.

Assuming for the purposes of this opinion, although there may well be doubt upon the subject, that the Commission on Administration and Finance has authority to make "Vacation Rules" and the Governor and Council authority to approve the same, the commission would be within its authority in making and publishing, as it has already done, its interpretations of such rules, and the Governor and Council, as the approving body and the one charged with the power to hear certain appeals by employees (G. L. (Ter. Ed.) c. 30, § 5), would likewise have authority to make its own interpretations of such rules.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Milk Control Board — Orders — Curtailment of Deliveries.

OCT. 2, 1945.

Milk Control Board.

DEAR SIRS: — In your letter dated September 12, 1945, you have asked my opinion on the following questions:

"(1) If the board after public hearing and on the basis of evidence received at such hearing, finds that the practice of every-other-day retail delivery of milk effects a substantial reduction in the cost of distribution, that if the practice of every-other-day delivery continues the price of milk to the consumer will remain substantially lower than it will if the general practice of daily delivery returns, that such lowered cost to the consumer would result in the consumption of more milk within the Commonwealth than would otherwise be consumed and would thereby benefit the public health and also improve the return to producers, and that such action would be most beneficial to the public interests and best protect the milk industry, may the board under the present provisions of chapter 94A properly adopt and continue in effect after the termination of the present emergency an order providing for every-other-day delivery as provided in Official Order No. G-702 enclosed?

(2) If so, may the board properly include in such order provisions for (*a*) single stop wholesale delivery, (*b*) limitation of special deliveries and (c) prohibition of call-backs, as contained in said Official Order No. G-702?

(3) If the answers to questions numbered (1) and (2) (c) are in the affirmative, may the board upon suitable finding with respect to the effect of earlier deliveries in creating necessity for call-backs for collection, properly adopt and continue in force a daylight delivery order similar to Official Order No. G-600?"

Question (1) is predicated upon findings of fact which you assume your board might make upon evidence produced before it at a future hearing. Inasmuch as such a hearing has not been held, and the evidence which may be produced at any such hearing is entirely problematical, as are also the facts to be found by your board after such a hearing, your question is purely hypothetical. The Attorney General, following a long line of practice and procedure of this office, does not render opinions upon hypothetical questions.

For your guidance, however, I suggest that the facts which the board assumes it would find after a hearing, and which are embodied in question (1), do not indicate that any order based thereon providing for every-other-day delivery would have any reasonable or material effect in carrying out the objects or purposes of the Milk Control Law. In the decision in the case of *American Can Company* v. *Milk Control Board*, 316 Mass. 337, 340, 341, the Supreme Judicial Court substantially states the purposes of the Milk Control Law to be "to provide for the establishing of minimum prices for milk which 'will be most beneficial to the public interest,' will 'best protect the milk industry,' and 'insure a supply of pure, fresh milk adequate to cover consumer needs.' § 10." Further intention and purposes of the Milk Control Law are stated in section 25 of the act, which reads as follows:

"It is hereby declared that the production and distribution of milk is an industry affected with a paramount public interest relating to the public health. The intention and purpose of this chapter is hereby declared to extend to the regulation of said industry and to the control of all milk sold or offered for sale in the commonwealth, to the full extent permitted by the constitutions of the commonwealth and of the United States, respectively."

The powers of the board as stated in the first decision in the case of the *American Can Company* v. *Milk Control Board*, 313 Mass. 156, 158 are —

"'to supervise and regulate the milk industry of the commonwealth, including the production, purchase, receipt, sale, payment and distribution of milk,' and the control of unreasonable and burdensome surpluses; to apportion equitably among producers the total value of milk purchased by dealers: to encourage the production of a regular, continous and adequate supply of fresh milk; to promote programs designed to increase its consumption; to investigate and regulate for the purposes of the law 'all matters pertaining to markets, to the production, manufacture, processing, storage, transportation, disposal, distribution and sale of milk . . . and to the establishment and maintenance of reasonable trade practices relative to milk.'"

The suggested order of the board does not seek to prevent any unfair practice, illegal act or detrimental feature of the milk industry in its rela-

tion to the public. Moreover, it does not appear from anything stated in your letter that such an order, if adopted, could have such evidential support for factual findings required by section 21 of the Milk Control Law as would impel the Superior Court to sustain the order in the event of a petition for a review.

In the case of *Germain E. Cloutier* v. *State Milk Control Board,* 92 N. H. 199, the court passed upon a State order pursuant to a Federal order requiring every-other-day delivery by "any means or device whatever." This order was adopted for the purpose of preserving rubber and gasoline while the country was at war. The court's decision enforced the order in so far as it pertained to the delivery of milk by vehicles using rubber tires or gasoline, because of the necessity of these commodities for the prosecution of the war. As to all other methods of delivery, the court held that the prevention of daily deliveries created an inroad upon individual rights, and that the balance of private over public interest was too overwhelming to permit a ban on such daily deliveries.

Questions (2) and (3) are not answered or discussed, since they are predicated on question (1) being answered in the affirmative.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Metropolitan District Commission — Permit to Owner of Land Abutting on a Way for a Driveway — Roads — Parkways — Boulevards.

OCT. 5, 1945.

Metropolitan District Commission.

GENTLEMEN: — You have asked my opinion as to whether or not your commission is required to issue a permit to an abutting owner of land for the construction of an opening or driveway leading directly from said land to the Veterans of Foreign Wars Parkway.

The answer to this question seems to depend on whether or not the Veterans of Foreign Wars Parkway is a road within the jurisdiction of your commission by the provisions of G. L. (Ter. Ed.) c. 92, § 33, or by virtue of section 35 of said chapter.

G. L. (Ter. Ed.) c. 92, § 33, provides in part:

"The commission may acquire, maintain and make available to the inhabitants of . . . open spaces for exercise and recreation, in this chapter called reservations; and, for the purposes set forth in this section, the jurisdiction and powers of the commission shall extend to, and be exercised in, said district. . . ."

G. L. (Ter. Ed.) c. 92, § 35, provides:

"The commission may connect any way, park or other public open space with any part of the towns of the metropolitan parks district under its jurisdiction by suitable roadways or boulevards, in this chapter called boulevards, and for this purpose exercise any of the rights and powers granted the commission in respect to reservations, and may construct and maintain along, across, upon or over lands acquired for such boulevards or for reservations, a suitable roadway or boulevard. The commission shall have the same rights and powers over and in regard to said boule-

yards as are or may be vested in it in regard to reservations and shall also have such rights and powers in regard to the same as, in general, counties, cities and towns have over public ways under their control."

It seems clear from these sections that two classes of roads may be constructed by your commission. Such roads as are constructed by your commission under section 33 may be reasonably classified as not being public ways and, in the absence of an easement by deed or reservation, the abutting owner will not have any right of way from his land to such road. *Gero* v. *Metropolitan Park Commissioners*, 232 Mass. 389.

In *Burke* v. *Metropolitan District Commission*, 262 Mass. 70, 80, the court stated:

"The commissioners are within their rights if they take reasonable measures to promote the safety of travellers upon the parkways in their charge, and to that end to prevent entrances thereto and exits therefrom which will tend to interrupt or endanger traffic so far as this legally may be done. They are not acting in excess of their authority if, for reasons having relation to the public safety and convenience, they are opposed to the establishment of filling stations with driveways to and from them from parkways because of the tendency of openings from such stations to create a special menace to the safety of travellers upon the parkway. They reasonably may consider such matters in their efforts to solve the problem of traffic control on congested parkways."

It is to be noted, however, that the Veterans of Foreign Wars Parkway was not constructed by your commission, but by the Public Works Department pursuant to the provisions of St. 1930, c. 420, § 4, and turned over to your commission pursuant to section 18 of said chapter. Only by implication then can this road be said to come under your jurisdiction pursuant to section 33 of chapter 92, the language used in this section being "The commission may acquire, maintain and make available . . ."

It cannot be definitely said, therefore, that the Veterans of Foreign Wars Parkway is a road coming within the provisions of section 33, even though it may be so contended by your commission. It is doubtful what the Supreme Judicial Court would decide in these circumstances. A study and search of the decided cases does not reveal any exactly in point.

The second class of roads under the jurisdiction of your commission is provided for by G. L. (Ter. Ed.) c. 92, § 35. The power of regulation by your commission of both classes of roads is provided for by section 37 of chapter 92, where the commission is given authority "to make rules and regulations for the government and use of reservations or boulevards under its care." The roads provided for by section 35 of chapter 92 are commonly called "boulevards."

In an opinion on this subject, dated September 19, 1923, this department advised your commission:

"As to these boulevards the Commission is given the same powers which it has in regard to reservations, and additional powers such as those exercised by other public bodies over public ways. These boulevards constructed under section 35 are public ways. *Whitney* v. *Commonwealth*, 190 Mass. 531.

It is a settled principle of our law that abutting owners have a right of way for reasonable needs from their lands to the public way adjoining. The abutting owner's right of access to and from the public way is as much his property as his right to the soil within his boundary lines. With regard, therefore, to owners of land abutting on the roads called 'boulevards,' made under section 35, your Commission has not the power to prevent the construction by the abutting landowners of ways leading from their land to such boulevards. If at any time easements granting such right of connection with the highway to the owners of abutting lands have been given by easements in deeds from the Commonwealth, the rights of the abutting owners are additionally confirmed thereby.

Although the Commission has not the power to prohibit the exercise by the abutting owner of his right of access to and from a public way constructed under section 35, yet it has the power to regulate the manner in which he shall use his right of access."

It follows from what is stated above that your commission has power to prohibit the construction by an abutting owner of a private way connecting with such roads as come within the provisions of said section 33, provided there is not an easement or reservation of right exercisable by such abutting owner by deed.

Your commission has not the right to prohibit the construction of a private way reasonably necessary for access to the land of an abutting owner connecting with a boulevard or road within the provisions of section 35. In the absence of a right of free access to a reservation, roadway or boulevard held by deed by the abutting owner, the commission by its reasonable rules and regulations may regulate the location and size of the private way that is to connect the abutting land.

In *Gleason* v. *Metropolitan District Commission*, 270 Mass. 377, 380, the court said:

"The taking in the case at bar was not made for park or reservation purposes or for both park and boulevard purposes. The effect of such a taking is not before us. The taking in the case at bar was made under an authority enabling the public board to construct roadways and boulevards. Whatever may be said as to distinctions between ordinary streets, roads and highways, on the one side, and parkways and boulevards constructed within public parks and reservations, on the other side, in the present case the boulevard was for purposes of public travel. It was established as a public way. Other powers over it by the respondent are incidental to that dominating purpose. That result follows from the terms of the statutes under which the taking was made. A taking of land for purposes of public travel or as a public way, in the absence of special restrictions and limitations, imports that abutters thereon have reasonable right of access thereto."

St. 1930, c. 420, § 4, authorizing the construction of the Veterans of Foreign Wars Parkway, provides that "The department is hereby further directed to lay out and construct a parkway or boulevard beginning at . . ."

Section 18 of the same chapter, authorizing the transfer to the Metropolitan District Commission, provides:

"When the work authorized under sections four and five shall have been completed, the overpass or underpass with approaches thereto and the parkways and or boulevards authorized therein shall be transferred

to the control of the metropolitan district commission and shall be kept in good condition and repair by said commission."

You will note that the work authorized is described in both sections as a "parkway or boulevard."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement — Teachers — Veterans — Payments for Military Service Credit.

OCT. 9, 1945.

Teachers' Retirement Board.

DEAR SIRS: — In a recent letter, in connection with your duties in preparing a budget for the fiscal year 1947, in which you state that you are presently engaged, you have asked my opinion as to the effect of the new Contributory Retirement Law (St. 1945, c. 658), which does not go into effect until January, 1946, upon payments to the special fund for military service credit provided for in paragraph (4) of section 22 of said chapter 658.

Your question reads:

"Will it hereafter be the obligation of the Commonwealth to appropriate for persons in military service the assessments which such persons would have paid had they remained in the public school service and if so, from what date does this obligation begin?"

In an opinion of one of my predecessors in office to the Commissioner of Corporations and Taxation on November 30, 1943, to which you refer in your letter and in which I concur, it was held that the provisions of St. 1941, c. 708, §§ 9 and 9A, read together expressed a legislative intent that the required payments to the funds of the retirement system on behalf of members on leave of absence should be made by the cities and towns in whose service they were employed.

The provisions of the new Contributory Retirement Law dealing with the funds for military service (St. 1945, c. 658, § 22 (4) and (7) (*b*), have not changed the law in this respect, and such payments are still to be made by cities and towns after January 1, 1946.

A single exception, however, has been made by the last Legislature to the requirement of such payments by cities and towns. St. 1945, c. 699, provides in effect that when a member of the Teachers' Retirement Association upon the termination of military or naval service returns to his employment as a teacher, but accepts such employment in another school department than that in which he had worked before his military or naval service, "any difference between the amount contributed to the annuity fund of the teachers' retirement system by the city or town by which he was formerly employed," as provided by said St. 1941, c. 708, §§ 9 and 9A, "and the total amount of contributions to said annuity fund to which such member is entitled thereunder shall be paid into said fund by the commonwealth."

The necessity for providing properly for the payments to be made both by a municipality and by the Commonwealth in cases of the particular type of returned teacher described in said chapter 699 should be borne in mind in preparing the budget referred to in your letter.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veteran — Retirement — Amount of Pension.

Oct. 9, 1945.

Hon. Thomas H. Buckley, *Chairman, Commission on Administration and Finance.*

Dear Sir: — I am in receipt from you of the following communication:

"A request has been received for retirement from Dr. Douglas A. Thom, part-time Senior Psychiatrist in the Department of Mental Health. We have recommended a retirement rate of $250 a year, being one-half of his basic salary of $500 for part-time services.

The Department of Mental Health has questioned this allowance and believes that Dr. Thom is entitled to one-half of the highest regular rate of compensation paid him in the same position, of $1500 a year.

They state that he worked the entire period of time on temporary appointments in the grade of Senior Psychiatrist and refer to St. 1943, c. 514.

In view of the fact that this seems to be the first request made by a part-time employee, we are wondering whether or not he should be retired under the highest rate under the act or the rate at the time of his retirement.

Other qualifications for retirement are in keeping with the provisions of St. 1943, c. 514."

In your communication you do not inform me of the status of said Thom as regards retirement nor of the statutory provisions under which it is proposed to retire him. I assume, however, from a reference to St. 1943, c. 514, in said communication, that said Thom is a veteran and is to be retired under the provisions of G. L. (Ter. Ed.) c. 32, § 56 or § 57 or § 58, as amended.

Although it is not plain from the statements in your communication, I assume, from what has been written, that said Thom was appointed to the position of "part-time senior psychiatrist" in the service of the Commonwealth; that the salary of such position is $500 a year and that such sum of $500 was "the highest regular rate of compensation" payable to him at any time during his occupancy of said position as "part-time senior psychiatrist." I also assume from the phraseology of your communication, although it is not stated clearly therein, that for a period during the time of Dr. Thom's employment in the service of the Commonwealth, he ceased to hold the position of "part-time senior psychiatrist" and by a series of temporary appointments held the position of "senior psychiatrist," which is a different position from that of "part-time senior psychiatrist"; that the highest regular rate of compensation which attaches to the position of "senior psychiatrist" is $1,500 a year, and this Dr. Thom received while occupying the last-named position, but that later he returned to the position of "part-time senior psychiatrist" and will be occupying the same at the time of retirement.

In all of sections 56, 57 and 58 of said chapter 32, as amended, it is provided that a veteran upon retirement shall receive a pension which is to amount to "one half of the highest rate of compensation . . . payable to him while he was holding *the grade held by him* at his retirement. . . ."

I am of the opinion that the word "*grade*" as employed by the Legislature in said sections of chapter 32 has the same meaning as the words "position of like character" and that a "part-time" position is not of like

character with a full-time position, even if the latter is held on a temporary basis, so that the position of "senior psychiatrist" is not in the same "grade" as that of "part-time senior psychiatrist." It follows that at the time of Dr. Thom's proposed retirement he will be holding the position or grade of a "part-time senior psychiatrist" and that the "highest rate of compensation" which has been "payable to him while he was holding such grade" was $500. The $1500 annual compensation which was paid to him was payable not while he was holding "the grade held by him at his retirement", but while he was previously holding the higher position or grade of "senior psychiatrist."

Upon the assumptions of fact drawn from such factual statements as appear in your communication, I am, accordingly, of the opinion that your recommendation of the retirement rate for Dr. Thom set forth in the first paragraph of said communication is correct.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veteran — Return to Service of Commonwealth — Vacation Pay.

OCT. 9, 1945.

HON. THOMAS H. BUCKLEY, *Chairman, Commission on Administration and Finance.*

DEAR SIR: — I am in receipt from you of the following communication:

"A request has been received from a former employee of the State as to his rights to benefits under St. 1945, c. 411. He entered the armed forces on January 23, 1942, while employed by the Commonwealth and then was retired by the Navy due to disability received in line of duty.

On May 1, 1943, he returned to his former position in the State service, from which he was retired on September 1, 1943, due to his inability to continue his work on account of the disability.

He now inquires as to his right to receive payment in lieu of vacation. It is the belief of the Commission and the Director of Personnel that the intent of the Legislature was that the benefit of St. 1945, c. 411, be granted only in the case of an employee who was to return and continue his employment with the Commonwealth.

Kindly advise me as to your opinion on the application of the Act."

St. 1945, c. 411, reads:

"AN ACT PROVIDING FOR PAYMENTS, IN LIEU OF VACATIONS, IN THE CASE OF CERTAIN EMPLOYEES OF THE COMMONWEALTH WHO HAVE BEEN GRANTED LEAVES OF ABSENCE TO ENTER THE ARMED FORCES OF THE UNITED STATES DURING THE PRESENT WAR.

Be it enacted, etc., as follows:

Any person in the service of the commonwealth who, prior to April thirtieth, nineteen hundred and forty-three, resigned or was granted a leave of absence from the service of the commonwealth to enter the armed forces of the United States during the present war and who, upon honorable discharge from such service in said armed forces, has returned or returns to the service of the commonwealth, shall be paid an amount equal to the vacation pay which he would have received in the year of his entry

into such service in said armed forces if his employment in the service of the commonwealth had not been interrupted by such service in said armed forces; provided, that no monetary or other allowance has already been made therefor."

Said chapter 411 provides for payment of an amount equal to the vacation pay which certain veterans would have received from the Commonwealth in the year of their respective entries into the armed forces of the United States if their services to the Commonwealth had not been interrupted by such entries.

The chapter provides that such a payment is to be made to a veteran, who, after honorable discharge from the armed forces, "*has returned or returns to the service of the commonwealth.*" The chapter contains no phrase to the effect that a *continuation* in the employment of the Commonwealth's service after a veteran has returned to it is a condition of receiving such payment, nor is there phraseology in the chapter which could create such a condition by implication.

You have stated that the veteran whose inquiry is under consideration returned to his former position on May 1, 1943, and he appears to have continued there until September 1, 1943. He appears not only to have returned but to have continued in the employment of the Commonwealth after such return.

Such veteran is entitled to the benefits provided by St. 1945, c. 411.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Insurance — Group Life Policy — Foreign Contract.

OCT. 15, 1945.

HON. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — In a recent communication you have advised me that certain Massachusetts organizations, members of the National Health and Welfare Retirement Association, Inc., a non-profit corporation licensed under the laws of the State of New York and authorized under section 200 of the Insurance Law of that State to issue a group annuity and life contract to an association of employers as the master holder of the contract, "propose to arrange for group life and group annuity coverage for their employees" under the following plan:

"Each community chest or social agency council or health or welfare agency will collect contributions from the contributing members and transmit them to the Retirement Association. When seventy-five per cent of the eligible employees have made application to become participants, salary deductions are to be made by the contributing members. All individuals newly employed by a contributing member after its entrance date must become participants and agree that their employers shall deduct contributions from their compensation payments. The monthly contribution of each employee is to be five per cent of his regular compensation and the employer contributes an amount equal to the contributions made by each employee and the employer makes an additional contribution over a period of years for the purpose of purchasing annuity benefits for employees who were in his service previous to the adoption of the Plan."

A death benefit in addition to the retirement annuity is also included in the plan and the policies and annuities are, I assume from the general context of your communication, to be purchased and issued in New York.

As you state in your communication, our Massachusetts insurance law does not authorize the issuance of a group life insurance policy or a group annuity contract which covers the employees of several individual employers as a group.

In your communication you direct attention to certain of the definitions contained in G. L. (Ter. Ed.) c. 175, § 1, and to sections 3 and 160 of said chapter, which you have set forth, and you have asked my opinion upon the two following questions with relation to the adoption of the said plan:

"In view of the definitions of the words 'company' and 'foreign company' appearing in G. L. c. 175, § 1, and the prohibition contained in section 3 of G. L. c. 175, and the language of section 160 of G. L. c. 175, does the adoption of this Plan by charitable, health or welfare organizations located in Massachusetts whose employees are Massachusetts residents and the making of deductions from the salaries of the Massachusetts employees of member organizations for the purpose of paying premiums constitute a violation of the Massachusetts Insurance Law?

The Plan states that a certificate, setting forth the employee's contract, will be delivered to each employee in Massachusetts insured under the Plan. Does the delivery of such a certificate to each employee in Massachusetts constitute a violation of the Massachusetts Law?"

I answer each of these questions in the negative.

The plan outlined in your communication, to be carried out for the benefit of employers and employees, is such that the principles of law stated in an opinion of May 27, 1937, to the then Commissioner of Insurance by one of my predecessors in office, with which I concur, with relation to the purchase by Harvard University of deferred annuity contracts from a New York insurance company for its employees, are applicable to it and compel the conclusion that the adoption of the said plan and the making of deductions from the salaries of the Massachusetts employees of member organizations for the purpose of paying premiums under the circumstances set forth in your communication do not constitute a violation of the insurance laws of the Commonwealth. The mere delivery of a certificate, such as you have described, to each employee in Massachusetts insured under the plan, does not, under all the factual circumstances of the plan which you have stated, constitute a violation of Massachusetts law.

A third question which you have propounded in your communication, relative to the appropriate jurisdiction for possible suits by employees to enforce, after reinsurance by a domestic life company, "conversion privileges" "available under the life insurance feature of the plan," is purely hypothetical in character, relates to possible courses of legal procedure open to employees in causes which might accrue to them, and is not one upon which the Attorney General may properly be required to render an opinion.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veteran — Bonus — Honorable and Dishonorable Discharge.

Oct. 16, 1945.

Hon. John E. Hurley, *Treasurer and Receiver General.*

Dear Sir: — I am in receipt from you of the following letter:

"I respectfully request a formal opinion from your office relative to the proper interpretation of the word 'dishonorable' as it appears in St. 1945, c. 731, § 1.

Said section sets forth as one of the requirements for eligibility that the veteran 'shall have received a discharge or release, other than a dishonorable one . . .'

Kindly advise as to whether the said word 'dishonorable' is to be construed as meaning 'other than honorable' or 'dishonorable' in the sense indicated by the War, Navy and Marine Departments when issuing a type of discharge classified as 'dishonorable'."

The Attorney General does not customarily make interpretations of statutes unless an interpretation is necessary in order to render an opinion upon a question of law relative to the performance of some duty presently required of an officer of the Commonwealth.

For your guidance, however, in connection with the payment of the bonus to veterans under St. 1945, c. 731, let me say that the Legislature has provided in said chapter 731, section 1, that there shall be paid out of the treasury

"to each person who shall have served in the armed forces of the United States on or after September sixteenth, nineteen hundred and forty and prior to the termination of the present war . . . and shall have received a discharge or release, *other than a dishonorable one*, from such service, the sum of one hundred dollars . . ."

The Legislature has not provided that the bonus, so called, shall be paid only to veterans who have received an "honorable discharge." On the contrary, it has stated specifically that it shall be paid to such of the designated veterans who have received a discharge or release which is not a dishonorable one.

I am informed that the armed forces of the United States issue discharges or releases which are termed by them "honorable discharges"; that they also issue discharges which are termed "dishonorable discharges," and that, at least in the case of the army, a discharge termed "dishonorable" is issued only as a result of the finding of a court martial adverse to a soldier. I am also informed that in addition to the "honorable discharge" and the "dishonorable discharge" the armed forces issue other forms of discharges and releases which bear other names, and some of which indicate that they have been given for reasons which do not reflect credit upon the one to whom given.

The Legislature has, however, made no specific mention of discharges or releases of the type last mentioned. It has specifically stated the sum of one hundred dollars is to be paid to the veteran of the designated type who has received a discharge or release "*other than a dishonorable one.*" A discharge or release "other than a dishonorable one" would appear to include any discharge or release except a dishonorable one and to embrace within the meaning of the quoted phrase not only those termed "honor-

able," but those having some other name given to them so long as they were not denominated by the armed forces specifically as "dishonorable." It would not appear, from the phraseology of said chapter 731, section 1, to have been the intent of the Legislature to impose upon you the duty of examining the various causes of discharge or release set forth in the type of "discharge" or "release" which is not termed by the armed forces either "honorable" or "dishonorable" and then attempting to determine whether such causes were of such a nature that the discharge or release might be thought to be honorable or dishonorable.

In other words, unless a veteran's discharge or release is one termed "dishonorable" by the armed forces, he will be entitled to the bonus if he is otherwise qualified under said chapter 731.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement — Teachers — Credit for Out-of-State Service.

OCT. 18, 1945.

HON. JULIUS E. WARREN, *Chairman, Teachers' Retirement Board.*

DEAR SIR: — With relation to G. L. (Ter. Ed.) c. 32, as amended through the insertion by St. 1945, c. 658, § 1, of section 3 (4) "Credit for Teachers for Out-of-State Service," you have asked my opinion upon the following question:

"As the Teachers' Retirement System was not in effect prior to July 1, 1914, can credit be allowed for services rendered in the public day schools of other States prior to said date without the payment of assessments and, if so, is it only necessary that the service be verified?"

Said section 3 (4) reads:

"Any member of the teachers' retirement system who had rendered service as a teacher in the public day schools of any other state for any previous period, may, either before January first, nineteen hundred and fifty-one, or within five years after becoming a member or being reinstated as such, and before the date any retirement allowance becomes effective for him, pay into the annuity savings fund of the system in one sum, or in instalments, upon such terms and conditions as the board may prescribe, an amount equal to that which would have been withheld as regular deductions from his regular compensation for such previous period or most recent portion thereof as he may elect, in no event aggregating more than ten years, had such service been rendered in a public school of the commonwealth. In addition to the payment of such sum or instalments thereof, such member shall also pay into the annuity savings fund an amount of interest such that at the completion of such payments the value of his accumulated payments, together with regular interest thereon, actually made on account of such previous out-of-state service shall equal the value of his accumulated regular deductions which would have resulted if regular deductions had been made when regular compensation for such service was actually received. Upon the completion of such payments such member shall receive the same credit for such period of his previous out-of-state service or portion thereof elected as would have been allowed if such service had been rendered by him in a public school

of the commonwealth. Such member shall furnish the board with such information as it shall require to determine the amount to be paid and the credit to be allowed under this subdivision."

Under this section a teacher may receive credit for foreign service only by paying into the funds of the system "an amount equal to that which *would have been withheld as regular deductions* from his regular compensation for such previous period or most recent portion thereof as he may elect . . . had such service been rendered in a public school of the commonwealth."

Inasmuch as the Teachers' Retirement System was not established in effect until July 1, 1914 (St. 1913, c. 832) no amount would have been deducted from a teacher's regular compensation for service in a public school of the Commonwealth prior to July 1, 1914. It follows that under the terms of said section 3 (4) a teacher who had foreign service before July 1, 1914, can not comply with the condition set forth in said section 3 (4) as a prerequisite to the obtaining of credit for foreign service by paying in "an amount equal to that which would have been withheld . . . had such service been rendered in a public school of the commonwealth" before July 1, 1914. Accordingly, a teacher may not receive credit in the Teachers' Retirement System for service in the public day schools of the States rendered prior to July 1, 1914. Verification alone of foreign service without the requisite payments is not sufficient to entitle to credit.

The answer which I have given to your first question makes it necessary to state in answer to your second question that the vote which you describe in your communication, authorizing the giving of credit for foreign service prior to July 1, 1914, would not be a proper one for the Teachers' Retirement Board to pass.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Agency for Raising Money for Betterment of Social and Economic Conditions — Duty of Commissioner of Public Welfare.

OCT. 19, 1945.

HON. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — You have advised me in a recent communication that you have been asked to approve Lee Post No. 157 of the American Legion as a committee or agency "formed for the purpose of raising money to be used for the betterment of social or economic conditions" in such town under the provisions of G. L. (Ter. Ed.) c. 168, § 57, as last amended by St. 1945, c. 61.

You have written me further in such communication as follows:

"I am of the opinion that the Lee Post is comprised of competent and reliable people whom as individuals I could approve in writing but I am in great doubt as to whether or not the Post itself is a relief agency or committee formed for the purpose of raising money to be used for the betterment of social and economic conditions in the community.

I would like to have the opinion of the Attorney General as to whether or not I should approve the application of the Post on the latter ground."

Said section 57, as so amended, provides that a savings or a co-operative bank may contribute

"to any general fund being raised by a relief committee or agency approved by the commissioner of public welfare as evidenced by a writing filed in his office, and formed for the purpose of raising money to be used for the betterment *of social* and economic *conditions* in the *community* where such corporation is established . . ."

The Legislature has not required that you should give specific approval to the particular purpose for which a relief committee or agency is raising funds. It has authorized the corporations referred to in said section 57 to contribute only to an approved committee or agency "formed for the purpose of raising money to be used for the betterment of *social and economic conditions in the community where such corporation is established.*"

If in any given instance you are appraised of such circumstances as lead you to find as a matter of fact that the purpose for which a committee or agency was formed was not that of raising money to be used for the betterment of social and economic conditions, you will be justified in the exercise of your discretion in withholding approval of such committee or agency. However, you are not required by the statute, if you approve a relief committee or agency as such, to conduct an investigation to determine the precise nature of the use to which raised funds will be applied, nor does your approval of the committee or agency raise any presumption that the use of the raised money is to be "for the betterment of social and economic conditions" in any community. See opinion of the Attorney General to the Commissioner of Public Welfare, December 4, 1942.

Whether or not the said Lee Post is, under all the surrounding circumstances of its present undertaking, a relief committee or agency formed for the purpose of raising money to be used for the betterment of social and economic conditions is, as I have indicated, a question of fact, and as such it is one to be determined by you. The Attorney General does not pass upon questions of fact.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Foster Homes for Infants — Commissioner of Veterans' Services.

OCT. 23, 1945.

Hon. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — I am in receipt of your letter of October 16th.

There does not appear to be any principle of law which would relieve the Commissioner of Veterans' Services from complying with the requirements of G. L. (Ter. Ed.) c. 119, § 6, when placing in a foster home an infant under fourteen years not related to the person receiving it. Likewise, the foster parents of such an infant so placed are subject to the provisions of G. L. (Ter. Ed.) c. 119, §§ 1–7, if they have in their custody at one time two or more infants of the type and for the purposes set forth in said section 1.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Port of Boston Authority — Plans — Contracts — Costs.

Oct. 24, 1945.

Port of Boston Authority.

Dear Sirs: — You have asked my opinion upon several questions relative to the proposed acquisition by the Authority of the Mystic Wharves and the construction thereon of a new pier.

The power to acquire this particular property and to construct a new pier thereon was specifically vested in the Department of Public Works by St. 1941, c. 714, "for the purpose of improving the pier facilities in the port of Boston." By section 21 of said chapter 714 the said department was empowered to request of and have issued by the State Treasurer bonds aggregating $4,700,000 to meet the expenditures incurred in carrying out the powers conferred by said chapter 714.

In 1945 the Legislature enacted chapter 619, which established your board and gave it certain powers, and inserted a new chapter, 91A, in the General Laws, which new chapter vested your board with certain other powers of a general nature for the administration of the port, the acquisition of property, the construction of piers and other facilities for the port and authorized a bond issue of $15,000,000

"for the purpose of purchasing sites and pier locations and the construction thereon of pier facilities under authority of *chapter ninety-one A of the General Laws* inserted therein by section three of this act. . . ."

Said chapter 91A, in view of the prior existence of said St. 1941, c. 714, cannot be construed as granting to your board under its general powers authority to acquire or deal with the Mystic Wharves, which authority had previously been specifically vested by said chapter 714 in the Department of Public Works.

The General Court, however, by the provisions of section 5 of said chapter 619, conferred upon your board:

"All the rights, powers and duties on the effective date of this act pertaining to the department of public works in respect to lands, rights in lands, flats, shores, waters and rights belonging to the commonwealth in tidewaters and in lands under water, within the port of Boston . . . and any other rights and powers heretofore vested by the laws of the commonwealth in the department of public works in respect to the port of Boston not heretofore in this act expressly vested in or imposed upon the Port of Boston Authority . . . are hereby transferred to and hereafter shall be vested in and exercised by the Authority. There is also transferred to and vested in the Authority the right to request the raising of funds under the provisions of chapter seven hundred and fourteen of the acts of nineteen hundred and forty-one and to expend the same."

Such funds, as has been previously stated, were by the terms of said chapter 714 to amount in the aggregate to $4,700,000.

Your first question reads:

"1. If the Authority believes that it is in the public interest that it acquire Mystic Wharves and construct thereon a pier,

(*a*) has it, by virtue of the provisions of section 5 of said chapter 619,

all the powers in this regard formerly vested in the Department of Public Works by St. 1941, c. 714, and

(*b*) if it has such powers, is it restricted in the exercise thereof by the conditions and limitations contained in said chapter 714?"

I answer both the queries contained in this question in the affirmative.

Your second question reads:

"Has the Authority, by virtue of the provisions of G. L. c. 91A, § 3, as amended by section 3 of said chapter 619, and by virtue of the provisions of section 10 of said chapter 619, power to acquire the Mystic Wharves property and to construct a pier thereon subject to such limitations as may be imposed by said sections but without regard to the limitations and conditions imposed by St. 1941, c. 714?"

I answer this question in the negative.

Your third question is divided into three parts.

The first of these reads:

"If the Authority believes that it is in the public interest that it acquire Mystic Wharves and construct thereon a pier —

(*a*) May it, prior to entering into a contract for a lease of the land and pier, retain, at cost to the Commonwealth, the services of an engineering firm to draw the detailed plans of the pier?"

I answer this query to the effect that the authority vested in the Department of Public Works by said St. 1941, c. 714, § 1, with relation to the acquisition of the Mystic Wharves and construction of a pier thereon and its lease, which authority was transferred to your board by said St. 1945, c. 619, § 5, is broad enough to impliedly authorize the employment of an engineering firm to draw detailed plans of the pier to be leased.

The second part of this third question reads:

"(*b*) May it, if a contract for a lease of the land and pier is executed, enter into a contract for the construction of the pier if the contract price for such construction, added to the cost of acquisition of the land, will, in the aggregate, exceed $4,700,000, charging such cost so far as possible to the loan appropriation contained in St. 1941, c. 714 and the balance of such to the loan appropriation contained in section 10 of chapter 619 of the Acts of 1945 or charging such cost wholly to the latter loan appropriation?"

I answer this question in the negative.

St. 1945, c. 619, § 10, provides with relation to the appropriation and bond issue authorized therein:

"Subject to the conditions herein imposed, for the purpose of purchasing sites and pier locations and the construction thereon of pier facilities *under authority of chapter ninety-one A of the General Laws*, inserted therein by section three of this act, the state treasurer shall . . . issue and sell . . . bonds of the commonwealth . . . not exceeding, in the aggregate, the sum of fifteen million dollars . . ."

As has been indicated, acquisition of and construction on the Mystic Wharves is not made "*under authority* of chapter ninety-one A of the General Laws" but under authority of St. 1945, c. 619, § 5. Consequently, the costs of such acquisition and construction may not exceed $4,700,000 and may be charged only against the "loan appropriation" of that amount provided for in St. 1941, c. 714, and neither the whole

nor any part of such costs may be charged to the "loan appropriation" of not more than $15,000,000 provided for in St. 1945, c. 619, § 10.

The third part of said question reads:

"(*c*) May it enter into a contract for a lease of the land and pier should the reasonably estimated cost of the project exceed $4,700,000 if the lease contains a covenant by the lessor to construct the pier or a right of cancellation if the pier is not constructed?"

The phraseology of this question is such, since the hypothetical facts upon which it appears to be predicated cannot be plainly apprehended, that it may not properly be answered.

Your fourth question reads:

"Has the Authority, by virtue of the provisions of G. L. c. 91A, § 3, as amended by St. 1945, c. 619, § 3, power to prepare plans for the construction of new facilities and to charge the cost thereof to the loan appropriation contained in section 10 of said chapter 619 and, if not, out of what funds may such costs be met?"

The last sentence of the first paragraph of G. L. c. 91A, § 3, as inserted by St. 1945, c. 619, § 3, provides:

"The Authority shall prepare plans and estimates of the cost of acquiring needed pier facilities and of the construction of such new facilities as it shall determine to be necessary . . ."

There would appear to be implied authority under the provisions of said G. L. c. 91A, § 3, and of said St. 1945, c. 619, § 10, for the preparation of plans for the construction of new facilities and the charging of the cost thereof against the "loan appropriation" provided by said section 10. However, the cost of plans with relation to construction of new facilities in connection with the Mystic Wharves may not be charged against the "loan appropriation" not exceeding $15,000,000 established by said section 10 of chapter 619, but must be charged against the "loan appropriation" of $4,700,000 made available to your board by the terms of said St. 1941, c. 714, and St. 1945, c. 619, § 5.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Metropolitan District Water Supply Commission — Authority to use Surplus Money.

OCT. 25, 1945.

Metropolitan District Water Supply Commission.

GENTLEMEN: — In a recent communication you have requested my opinion on the utilizing of certain sums of money amounting to approximately $1,200,000 and now in the State treasury, received from rentals, sales of buildings and sales of standing timber by your commission, as authorized by St. 1927, c. 321, § 19, which act was for further construction of certain projects in addition to those authorized and directed by St. 1926, c. 375.

Your commission was created by St. 1926, c. 375, § 1. Section 8 of that act provides as follows:

"For the purpose of carrying out the provisions of this act, the commission may expend such amounts, not exceeding *in the aggregate* fifteen

million dollars, including the sum required to be paid by the city of Worcester under section twelve, as may, from time to time, be approved by the governor and council. . . ."

St. 1927, c. 321, further extended the commission's powers of construction in additional development, and in section 27 thereof it is provided as follows:

"For the purpose of carrying out the provisions of this act, the commission may expend such amounts not exceeding *in the aggregate* fifty million dollars, as may from time to time be approved by the governor and council. . . ."

Under the act of 1926 a bond issue of $14,000,000 was authorized. Under the act of 1927 a bond issue not exceeding the sum of $50,000,000 was authorized in addition to the loans authorized by the act of 1926.

St. 1927, c. 111, provided for an appropriation for further water supply needs to be spent by your commission, and in section 6 thereof provided as follows:

"For the purpose of carrying out the provisions of this act and of installing such purification or treatment works in connection with the water supply of the district as may be required by or incidental to the diversions herein required or authorized, the commission may expend such amounts, not exceeding *in the aggregate* nine hundred thousand dollars, as may from time to time be approved by the governor and council, and a sum not exceeding said amount is hereby appropriated, to be defrayed from the proceeds of bonds . . ."

It is my opinion that the word "aggregate" as used in these acts means the total or gross sum which the commission may expend.

In section 8 of St. 1926, c. 375, it is provided that the amounts necessary, among other things, for maintaining and operating the works to be constructed by the commission shall be added to the annual assessment upon the cities and towns comprising the Metropolitan water district and collected from them under chapter 92 of the General Laws. Again, in section 7 of the same act, the commission is empowered to sell or contract for the sale or use of any power or electricity so created, but directs the commission to pay the sums of money so received in reduction of the charges of maintenance of said works.

It is believed, therefore, that the use of the word "aggregate" in the three acts referred to is purposeful in limiting the expenditure by the commission of the three respective amounts of $15,000,000, of $50,000,000, and of $900,000 so as to limit, among other things, the assessments upon cities and towns for the maintenance and operation of the works constructed. The proviso that income from the sale or use of power and electricity should be applied to reducing the charge of maintenance seems to bear out this intention of the Legislature.

By section 19 of St. 1927, c. 321, the commission was authorized to sell at public or private sale, or exchange or lease, any property, real or personal, or any easement or water right, including any land in new cemeteries provided for in section 9 of the act, whether taken by eminent domain or otherwise acquired, which in the opinion of the commission is no longer needed for the purposes of this act. The same section provides:

"Any sums of money so received shall be applied by the state treasurer to construction costs or to reduce the bonded indebtedness for the works."

It is my understanding that at the present time the commission has not expended by several millions the amount provided under the bond issue, and therefore it could be said that legally this sum of money could be applied by your commission to the construction costs. But such application would not, in my opinion, vary the authorization under the various acts. When the total sums authorized in these acts, regardless of their source, are expended by the commission, the power and authority of the commission to use any surplus money over and above the aggregate amounts is ended and an act of the Legislature to expend the balance on hand would be required.

Therefore, my answer to your question is in the negative.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Port of Boston Authority — Plans — Contract — Costs.

OCT. 31, 1945.

Port of Boston Authority.

DEAR SIRS: — I am in receipt of your letter of October 26th in which you ask for a clarification of my opinion to you of October 24th in relation to your questions 3 (a) and 4.

I am of the opinion that your board may *not* retain at the cost of the Commonwealth the services of an engineering firm to draw the detailed plans of a pier structure before a written contract providing for the lease of the property has been executed. Such action by your board is forbidden by the proviso contained in St. 1941, c. 714, § 1, quoted in your letter of October 26th. In my answer to your question 3 (a) in my letter of October 24th, I used the phrase "plans of the pier to be leased," assuming that a contract to lease had already been executed. Such assumption appears to have resulted from a misapprehension of the scope of your hypothetical question.

With relation to the opinion which I expressed in my letter of October 24th relative to your fourth question, the type of plans which your board is specifically empowered by St. 1945, c. 619, § 3, to prepare, are "*plans and estimates of* the *cost* of acquiring needed pier facilities and of the construction of . . . new facilities" *for submission to the Legislature* in each year for its consideration.

It is obvious that plans of this type intended by the General Court for its annual consideration in respect to possible necessary legislation concerning the port of Boston are of a different, less expensive, and less detailed kind than plans drawn expressly for the work of actual construction. The preparation of plans of this type is specifically authorized by said section 3, and no particular provision for payment of their cost is made. It would appear, therefore, as I have indicated in my letter of October 24th, that the cost of the preparation of such plans might be charged against the "loan appropriation" provided by section 10 of said chapter 619.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement — Veterans — Contributions by Commonwealth.

Oct. 31, 1945.

Hon. John E. Hurley, *Chairman, State Board of Retirement.*

Dear Sir: — The State Board of Retirement through you has asked my opinion in a recent letter as to the date which should be used in computing the amount of contributions to be made by the Commonwealth to the funds of the retirement system on behalf of persons returning to the Commonwealth's service after a military leave of absence. The letter calls my attention to the applicable statutes and states:

"The question arises as to whether or not the Legislature intended the Commonwealth to pay for the contributions of those employees who entered into private employment for any period of time subsequent to their actual termination of service with the military or naval forces."

With relation to those persons who have left the employ of the Commonwealth for the purpose of serving with the military or naval forces of the United States, and are consequently deemed to be on leave of absence and may be re-employed before the expiration of one year (or two years if such person is under civil service) from the termination of such military or naval service (St. 1941, c. 708, §§ 1, 2, as amended), provisions are made in St. 1941, c. 708, § 9, with respect to their "creditable service" and to the payment by the Commonwealth of the amount of contributions to the system which such persons would have made if their service with the Commonwealth "had not been interrupted" by their military or naval service. Such "creditable service" and such payments are to be allowed and made, respectively, when such persons are "reinstated" or "re-employed" in the Commonwealth's service.

The provision in said section 9 as to the time for which "creditable service" is to be allowed and the provision in said section 9 with regard to the time to be covered by the payments of contributions in behalf of the reinstated veteran are not the same.

With regard to the "creditable service" it is provided in said section 9:

"Any person referred to in section one shall, when reinstated or re-employed . . . have credited to him as *creditable service* . . . the *period of his said military or naval service.*"

So that "creditable service" is to be calculated as of that time only which constituted the period of *actual military or naval service* and does not include the further time or period after the end of such actual service while the employee was still deemed to be on leave of absence or during which he was still entitled to reinstatement.

With regard to the time to be covered by the contributions payable by the Commonwealth, the said section 9 provides:

"If such person (a person referred to in c. 708, § 1) remained a member of any contributory retirement system . . . the commonwealth . . . shall at the time of such reinstatement or re-employment, or as soon thereafter as an appropriation therefor is made, pay into the annuity savings fund of such retirement system the amount which said person would have paid into said fund *had his employment in* the service of the

commonwealth . . . *not been interrupted by his said military or naval service* . . ."

Such a person's employment in the service of the Commonwealth was "interrupted" by his entering the military or naval service. As a consequence of such *interruption* the amounts which he would otherwise have paid into the funds of the system were not contributed, and it is those uncontributed amounts which the Commonwealth is now to pay up on behalf of such a person. Contributions, not only for the period when such a person was actually in the military or naval service, were unpaid, but those during the further time, after the termination of such actual service, when reinstatement had not yet occurred, were unpaid. All of these, both before termination of actual military or naval duty, and those during the period after such termination and before reinstatement, were such as would have been paid if the employment in the Commonwealth's service of such a person had not been "interrupted" by his military or naval service.

It follows that the Commonwealth is to make good the amount of all the contributions which such a person did not pay from the time when his employment with the State was "interrupted" by his entry into the armed forces until his reinstatement.

If the intent of the Legislature had been otherwise in enacting section 9, it would have expressed it by the use of some phrase as, pay into the annuity savings fund the amount which such person would have paid during the period of his military or naval service if he had remained in the service of the Commonwealth during such period.

It is immaterial whether such a person after leaving the military or naval service chose to remain unemployed before seeking the reinstatement to which he was entitled or engaged in some gainful private employment during that period. Upon such person's reinstatement or re-employment, the Commonwealth is to make up the contributions which he would have made if he had not gone to the war or, as the statute expresses it: "had his employment in the service of the commonwealth . . . not been interrupted by his said military or naval service."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Department of Public Works — Bridges — Transfer of Control — St. 1945, c. 690.

Nov. 6, 1945.

HON. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — I am in receipt from you of the following letter:

"In carrying out the provisions of St. 1945, c. 690, the Department requests a decision from you relative to the public authority approving the transfer of any bridges eligible to be taken over by the Department under this chapter.

Would the selectmen of a town have the authority to approve a transfer of this nature in accordance with chapter 81, section 4, without first receiving the approval through the procedure of a town meeting?"

Said St. 1945, c. 690, § 1, provides for the transfer of the care, control and maintenance of certain public highway bridges from cities and towns to the State Department of Public Works:

"provided, that prior to January first, nineteen hundred and forty-six, *the public authority in charge of* (any) *such bridge* shall have filed with said department approval of the transfer aforesaid."

It is impossible to give to the words "the *public authority* in charge of such bridge" as used in said section 1 a general definition which shall be applicable to officials of all towns or all cities. Such public authority will be of a different character in various towns and cities according to the particular form of local government, whether created by adoption of different statutory provisions or by the acceptance of particular charters or by reason of special statutes concerning certain bridges.

The authority granted by G. L. (Ter. Ed.) c. 81, § 4, to certain designated officials to perform particular acts with respect to public ways, referred to in your letter, has no relation to the acts of approval of the transfer mentioned in said chapter 690.

In the generality of towns the public authority having charge of bridges as part of the public ways will be either the selectmen or the road commissioners (but not the highway surveyor or superintendent of streets), depending upon the administration set up in this respect of any particular town.

As to cities, many of which function under special charters and differ from each other in regard to the duties of their respective officers, no general rule can be laid down as to who is or is not "the public authority" referred to in said chapter 690. Moreover, special statutes exist in many instances providing for the charge and maintenance of particular bridges. Each case in this respect will have to be viewed in the light of the particular statutes applicable to it.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State Employees — Establishment of Working Hours.

NOV. 7, 1945.

HON. HERMAN A. MACDONALD, *Department of Public Works.*

DEAR SIR: — You have asked my opinion "as to whether or not the Commissioner of Public Works has the authority to establish the working hours of the employees of the department."

I answer this question in the affirmative.

The Legislature has not determined the number of hours of work which are to be required of employees of the various departments, and the Division of Personnel and Standardization, if it has the power to make such a determination, which may be doubted, has not, as I am informed, purported to do so. In my opinion, no such legislative determination can be said to arise from the fact that the General Court has placed a limit upon the number of working hours in each day and week for laborers.

In the absence of such determination, the Commissioner of Public Works, like the administrative head of any of the State departments, has the authority to fix the working hours of the employees in such department. He must, of course, exercise such authority in a reasonable and non-discriminatory fashion with due regard to the maximum for such hours established by the Legislature.

A similar view was expressed by one of my predecessors in office in an opinion rendered you on April 30, 1942 (Report of the Attorney General, 1942, p. 165) with which opinion I am in accord. In so far as an opinion of a former Attorney General, given you on April 21, 1943 (Report of the Attorney General, 1943, p. 44), is at variance with the said opinion of April 30, 1942, I am not in agreement with such later opinion of April 21, 1943.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Milk — Registered Dairy Farms.

DEC. 4, 1945.

HON. FREDERICK E. COLE, *Commissioner of Agriculture.*

DEAR SIR: — You have asked my opinion, as to the following two questions:

"1. Does the issuance of a certificate of registration to a dairy farm obligate that farm to sell its milk in the markets of this Commonwealth?
2. Can the certificate of registration be revoked for failure of a registered dairy farm to sell or offer or expose its milk for sale in this Commonwealth?"

I answer both of these questions in the negative.

The pertinent statutory provisions involving the answer to these two questions are contained in G. L. (Ter. Ed.) c. 94, §§ 16A–16I, inclusive, as inserted by St. 1932, c. 305. A study of these sections indicates that they are intended to provide authority for the inspection, regulation, and control of the production of milk so as to assure sanitary conditions in its production and minimize the spread of certain diseases. These provisions are also intended to assure milk of a satisfactory quality for consumption in the Commonwealth of Massachusetts and are related more to the question of public health than to an adequate quantitative supply of milk. The problem of an adequate quantitative supply of milk for the Commonwealth is handled, as you are aware, by the Milk Control Board by authority of the Milk Control Act.

Section 16D is the only section definitely dealing with the question of revocation or suspension of certificates, and reads as follows:

"A certificate of registration of a dairy farm may be refused, suspended or revoked by the director for failure to comply with such rules, regulations and uniform minimum requirements; provided, that before any such suspension or revocation becomes effective, or upon such refusal, the parties concerned shall be given a hearing before the director or a person designated by him for such purpose. The parties concerned shall be given a reasonable notice of the hearing, specifying the day, hour and place thereof and accompanied by a statement of the alleged failure to comply, or the reasons for such refusal. The director may allow the parties concerned a period of not more than thirty days from the date of the hearing within which to make a substantial compliance with said rules, regulations and uniform minimum requirements. An appeal from the decision of the director may be taken to the board, whose decision shall be final. Notice of the refusal, suspension or revocation of a certificate of registration shall be given to each distributor or dealer of record handling milk produced on such dairy farm, and to the board of health of each town of record

where milk produced on such dairy farm is sold, offered or exposed for sale. In case of emergency, the department of public health may suspend or revoke any such certificate of registration."

The language of section 16D and the other sections does not indicate that a certificate of registration is issued conditionally on its recipient's selling or continuing to sell milk within the Commonwealth, nor does it indicate any obligation to do so. These sections are also lacking in language indicating any authority for the revocation of any registration certificate in cases where the selling of milk within the Commonwealth is discontinued by the holder of such a certificate.

While the last sentence in section 16D states "In case of emergency, the department of public health may suspend or revoke any such certificate of registration," it is my opinion that the emergency intended should be one consistent and allied with the general purposes and intention of the sections in question, namely, the regulation of a public health problem, rather than the assurance of an adequate quantitative supply of milk.

The regulations of the Milk Regulation Board contain none that have any relationship to the questions concerned.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Department of Conservation — Authority of Inspectors to Stop Motor Vehicles in Suppressing Gypsy Moths.

DEC. 4, 1945.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — In a recent letter you have asked my opinion upon two questions of law:

1. Have your inspectors legal authority to halt a trailer or other vehicle upon a road or highway, inspect it, and, if egg clusters are found, detain such vehicle until the eggs have been treated?

2. Have your inspectors the legal authority to enter a public trailer camp and inspect all trailers parked therein and detain any which are found to be infested?

The authority of your inspectors is contained in G. L. (Ter. Ed.), c. 132, § 11, as amended. This section does not confer authority upon your inspectors to stop vehicles upon highways on suspicion that they may contain gypsy moth egg clusters. I therefore advise you that the first question must be answered in the negative.

The statute above referred to does confer authority to enter upon any land and there use all reasonable means in suppressing moths and tent caterpillars. Under the authority so conferred, I advise that your inspectors may legally enter any public or private trailer camp and inspect all vehicles found therein and, if the same are infested with gypsy moth eggs, detain said vehicles until the eggs have been treated.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Legislator — Qualifying Oath — Salary.

Dec. 13, 1945.

Hon. Frederick B. Willis, *Speaker of the House of Representatives.*

Dear Sir: — In a recent letter you have asked me to advise you whether in my opinion you are correct in your belief that under the provisions of St. 1945, c. 248, § 1, amending G. L. (Ter. Ed.) c. 3, § 9, the Governor and Council may, upon receipt of a communication from you stating that John D. Brown of Boston, who was elected a representative from the 4th Suffolk District, is entitled to the payment of $2500 provided by said section 9, as amended, as compensation as a representative for the regular annual session of the Legislature of the present year, authorize such payment notwithstanding the fact that said Brown did not take the qualifying oath until December 4, 1945.

Your letter does not state the reason for the delay to December 4, 1945, in the qualification to office of said Brown. Assuming that the circumstances with reference to the failure to qualify previous to December 4 are not such as to indicate an abandonment by the said Brown of his office as a representative, I am of the opinion that the belief which you have expressed is a correct view of the question of law involved. *Phillips* v. *Boston*, 150 Mass. 491, 493.

The Constitution of Massachusetts, pt. 2d, c. VI, art. I, provides that the persons elected to certain offices (including a member of the House of Representatives) shall subscribe to the oath therein provided before proceeding to execute the duties of their offices. This requirement was complied with by the member concerned on December 4, 1945, and on that day he became a member of the House of Representatives.

The compensation provided for by said section 9, as amended, is in its nature an annual salary which attaches to and is an incident of the office.

It is apparent from said section 9, as amended, that the salary of a member of the House of Representatives is an annual one, even though provision is made for its payment on a monthly basis at the request of the holder of the office.

An examination of the cases decided by our Supreme Judicial Court does not disclose any precisely in point, nor any indicating that the situation in this matter is not covered by the general rule as stated in American Jurisprudence, Vol. 43, § 379, p. 161, as follows:

"The right of a public officer to his fees, emoluments, or salary does not arise by virtue of contract, express or implied, but, if it exists at all, exists as a creature of the law and as incident to the office which he occupies. Such compensation as may be attached to the office, although not generally fixed on a quantum meruit basis, must necessarily be a reward for the performance of official duties. And it is the purpose of the law that the incumbent of an office shall devote his personal attention to the duties of the office to which he is appointed or elected. But this does not mean that he shall lose his title to the office or his right to the emoluments or salary connected with it because he may be absent or away from the office for a short, occasional, or even a protracted, period of time and does not during such period of time personally give his time and attention to the duties of the office."

The fact that a public officer has not actually performed the duties of his office does not deprive him of the right to receive his salary where there has been no abandonment of the office. *Leonard* v. *Terre Haute*, 48 Ind. App. 104. *Fitzsimmons* v. *Brooklyn*, 102 N. Y. 536. *Phillips* v. *Boston*, 150 Mass. 491, 493. Report of the Attorney General, 1941, pp. 56, 59. *Bell* v. *Treasurer of Cambridge*, 310 Mass. 484, 487, and cases cited. *Smith* v. *Jackson*, 246 U. S. 388. *State ex rel. Clinger* v. *White*, 143 Ohio St. 175.

In the case of *State ex rel. Clinger* v. *White*, 143 Ohio St. 175, the court substantially held that a person rightfully holding public office may be entitled to compensation attached thereto as an incident of his title to office, regardless of the exercise of the functions thereof, so that the officer's failure to perform duties of office does not necessarily deprive him of the right to compensation if his conduct does not amount to abandonment of office.

It follows from what has been stated above that the representative concerned may, after qualifying, receive the annual salary incident to the office for which he has qualified, provided that the reason for his failure to qualify and perform his duties does not constitute an abandonment of the office.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Department of Public Works — Logan Airport — Motor Vehicles — Rules — Busses — Hackney Carriages.

DEC. 18, 1945.

Hon. JOHN F. STOKES, *Commissioner of Public Safety.*

DEAR SIR: — In a recent letter you asked my opinion upon three questions of law:

"1. Is a common carrier, licensed in accordance with chapter 159A, a public automobile, as defined in the rules?

2. Is a motor vehicle, licensed as a common carrier in accordance with the provisions of chapter 159A, a hackney carriage, as defined in section 1 of the rules?

3. Does the Sutcliffe Storage & Warehouse Co., Inc. come within the supervision of the rules, and are they subject to the direction of any State Police officers assigned for duty, as provided in section 10 of the rules?"

The authority of the Department of Public Works to make rules and regulations and charges for the use of the General Edward Lawrence Logan Airport is contained in St. 1943, c. 528, § 6, which is as follows:

"The department of public works may make such rules, regulations and charges for the use of said airport or part thereof as it may from time to time deem reasonable and expedient, subject to the approval of the governor and council."

Acting under said authority and with the approval of the Governor and Council, the Department of Public Works has formulated certain rules and regulations for the use of said airport by busses and hackney carriages and taxicabs and in said rules, has defined a public automobile as follows:

Public automobile — a hackney carriage used for livery purposes, without a taximeter.

The above-mentioned authority of the Department of Public Works is paramount and is not derogated by G. L. c. 159A, § 7, under the terms of which the Department of Public Utilities issues certificates of public convenience and necessity.

Accordingly, I answer each of your questions in the affirmative.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service Commission — Director — Appeals — Classification Plans.

DEC. 18, 1945.

Civil Service Commission.

DEAR SIRS: — With relation to the classification plan established by the Director of the Division of Civil Service for the Boston Department of Public Welfare under G. L. (Ter. Ed.) c. 31, § 2A (*b*), as amended by St. 1945, c. 725, § 1, you have asked my opinion upon two questions of law as follows:

"1. Has the Civil Service Commission the power, by reason of its general authority to review the action of the director or under the item contained in the classification plan that it would review the action of the director, *the power to raise to a higher allocation* any position which the director upon recommendation of the appointing authority has allocated to a level to which the employee objects and appeals to this Commission for a hearing?

2. Has the Commission the power to raise the allocation to a higher grade under the circumstances set forth in paragraph one if the department head does not concur in the Commission's findings?"

I answer both of these questions in the affirmative.

The Civil Service Commission is vested with authority to "hear and decide all appeals from any decision of the director upon application of a person aggrieved by such decision." G. L. (Ter. Ed.) c. 31, § 2 (*b*), as amended. The authority to "decide all appeals" by implication must comprehend "the power to raise to a higher *allocation* any position" decided by the director to belong to a lower allocation, from which decision an appeal has been taken; otherwise, the authority to decide such an appeal would be a mere nullity devoid of all efficacy.

The power of the commission to raise a position upon such an appeal to a higher allocation than that decided upon by the director is not limited by the nonconcurrence in its findings or action by the head of a department in which the appellee is employed. No provision of the applicable statutes appears to require either a recommendation of an appointing or employer authority as a prerequisite to an allocation of a position in a classification plan by the director or the approval by such an authority of the findings or action of the commission upon an appeal from the decision of the director as to the allocation of a position under a classification plan.

Your questions relate only to classifications of "positions." With regard to the assignment of individual employees to positions newly classified, it would appear to be the duty of the director, in the first instance, to determine, in regard to each separate case, upon all the facts, whether or not the assignment of a particular employee to a newly classified position results in a promotion.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Milk Control Board — Director — Term of Office.

Dec. 19, 1945.

Mr. Roger F. Clapp, *Chairman, Milk Control Board.*

Dear Sir: — You have asked my opinion as to the duration of the term of office of the Director of Milk Control and the authority of the Milk Control Board to terminate the same or to establish the position on a definite term basis.

The office of the Director of Milk Control was established by the provisions of G. L. (Ter. Ed.) c. 20, § 8, which provide in its applicable part as follows:

"The board, subject to the approval of the governor and council, shall appoint a director of the division of milk control, whose title shall be director of milk control . . ."

This position or office does not come within the provisions of the Civil Service Law, since this law (G. L. (Ter. Ed.) c. 31, § 5) excludes therefrom "officers whose appointment is subject to the approval of the governor and council" and "directors of divisions authorized by law in the departments of the commonwealth, except those expressly made subject" to the Civil Service Law.

Since there is no period of time provided by our law as to the duration of the term of office of the Director of Milk Control, and since this office does not come under civil service, it follows that a removal of the Director of Milk Control can be effected only by the original appointing authority, which in this case would be "the board, subject to the approval of the governor and council."

It is also my opinion that any future appointment to the office of Director of Milk Control can not be made on any different basis or for any definite period of time, since such an appointment so made would be contrary to the provisions of chapter 20, section 8. If the best interests of the Commonwealth require it, and a more successful administration of the Milk Control Law can be had by the establishment of the term of office of the director for a definite period of time, this change can be effected by legislative intervention, but it can be brought about only by action of the General Court.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Director of Marine Fisheries — City Ordinance — Shellfish.

Dec. 27, 1945.

Hon. Archibald K. Sloper, *Commissioner of Conservation.*

Dear Sir: — In a recent letter you have written me as follows:

"Has the Director of Marine Fisheries of this Department the legal right to revoke his approval of a city ordinance or town regulation as granted by him under authority of G. L., c. 130, § 52, particularly the last paragraph thereof as appearing in St. 1941, c. 598?

For your consideration there is enclosed a copy of an ordinance of the city of Boston as passed by the City Council on March 26, 1945, approved

by the Mayor on April 16, 1945, and approved by the Director of Marine Fisheries on April 18, 1945.

Would a revocation of his approval render null and void any such city ordinance or town regulation?"

By the provisions of G. L. (Ter. Ed.) c. 130, § 52, the selectmen of a town bordering upon coastal waters and the board of aldermen or city council of a city so situated are authorized to regulate the taking of shellfish within such cities and towns, and may make regulations in regard to the same as they deem expedient. It is provided that any such regulations so made shall continue in force until the authority making them shall alter or rescind the same or the power given to them by the Legislature in this respect shall be repealed.

With respect to the making of regulations by municipal authorities with relation to the taking of shellfish from areas determined to be contaminated under G. L. (Ter. Ed.) c. 130, § 74, as to which you particularly inquire, the last paragraph of said section 52 provides:

"Nothing in this section shall be construed to authorize the aldermen, city council, or selectmen to exercise any authority hereunder in areas declared under section seventy-four or under corresponding provisions of earlier laws to be contaminated *unless such action is approved in writing by the director.*"

The statutes have nowhere provided that the director may withdraw or cancel his approval once given in writing to regulatory action of a municipal body with respect to areas declared to be contaminated.

It would appear, in view of the whole context of said section 52, that in giving his approval to such regulatory action of a municipal body with respect to areas declared to be contaminated the director has exhausted the power vested in him by the said last paragraph of section 52 with relation to such action, and that he cannot thereafter effectively revoke his approval of such action as expressed by the enactment of an ordinance or regulation.

Accordingly, I answer both the questions contained in your letter in the negative.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement Allowances for State Police Officers.

JAN. 10, 1946.

Hon. JOHN E. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — You have asked my opinion as to whether there are any provisions in G. L. (Ter. Ed.) c. 32, as amended by St. 1945, c. 658, which establish the amount and manner of payment of retirement allowances for officers of the Division of State Police, who might be retired under the terms of G. L. (Ter. Ed.) c. 32, § 28A, as amended by said St. 1945, c. 658.

I answer your question to the effect that there are no such provisions; that said section 28A has not been implemented specifically or by implication in any statutory terms which enable its purpose to be accomplished.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement System — Superintendent of Schools — Retirement for Superannuation — Elective Office.

JAN. 10, 1946.

HON. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — I am in receipt from you of the following communication:

"A member of the Teachers' Retirement System who is the superintendent of schools and a teacher in the public schools in the town in which he resides will become seventy years of age on January 5, 1946.

He is also by popular election town treasurer and a member of the board of selectmen. His term as town treasurer runs until March, 1946, and his term as selectman does not expire until March, 1947.

He is not a member of the retirement system of the town, never having exercised his option to join it.

Under section 21 of the General Laws, chapter 32, his application for retirement and related documents are forwarded to this department for examination and approval.

A question has arisen relative to the interpretation of the pertinent portions of General Laws, chapter 32, viz., section 5 (*d*), sentence 3, and section 91; and accordingly we are asking your advice and opinion on the following questions: —

1. Must this person vacate the offices of selectman and treasurer on January 5, 1946?

2. Is this person entitled to continue to hold the offices of selectman and treasurer until the next annual election for the respective positions?

3. May a member of the Teachers' Retirement System who holds elective offices in a political subdivision which has a retirement system of which he is not a member continue to hold elective offices as provided for in the third sentence of section 5 (*d*) of General Laws, chapter 32?

4. If the answer to question 1 is in the affirmative, may the board of selectmen recall him to the offices of treasurer and member of the board of selectmen for the 'duration of war' under the provisions of chapter 16 of the Acts of 1942?"

Although the questions which you ask are to some extent hypothetical, their determination may be of assistance to you shortly in performing the duties with relation to retirement systems which have been placed upon you by the Legislature in G. L. (Ter. Ed.) c. 32, §§ 21 and 24, as most recently amended by St. 1945, c. 658. Consequently, I advise you that in my opinion the answer to your first question is in the negative, and the answers to your second and third questions are in the affirmative. Since the answer to the first question is in the affirmative, no answer is required to your fourth question.

Although the person to whom you refer will be retired from his position as superintendent of schools on January 5, 1946, by reason of having attained the age of seventy, and will thereafter by force of such retirement cease to be a member of the Teachers' Retirement System, he will not on that account be obliged to vacate the elective offices of town treasurer and selectman which he has also held.

Section 91 of said chapter 32 provides in this respect in its applicable part:

"No person while receiving a pension or retirement allowance from . . . any . . . town . . . shall, after the date of the first payment of such pension or allowance, be paid for any service rendered to the . . . town . . ."

No provision of the statutes requires that such a person shall vacate an elective town office upon receiving a pension or retirement allowance, or upon becoming seventy if not a member of a town retirement system. It does, however, forbid the receiving of compensation for service in such office thereafter.

If, in his capacity as an elective town officer, the person in question had been a member of a town retirement system, which you say he was not, his right to retain his elective town office or offices after attaining the maximum age for his group of members would have been governed by the provisions of G. L. (Ter. Ed.) c. 32, § 5 (1) (*d*), sentence 3, to which you refer, and by the specific terms of that sentence he would have been capable of serving in such elective town office or offices without loss of pay until the next regular election.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Armory — Non-military Use — Adjutant General.

JAN. 14, 1946.

Brig. Gen. WILLIAM J. KEVILLE, *The Adjutant General.*

DEAR SIR: — You have asked me as to whether a certain non-military use of an armory, described in a letter which you have transmitted to me, may be granted.

The Attorney General does not pass upon questions of fact.

As a matter of law, the purposes for which armories may be used other than for the military purposes of the organized militia have been set forth specifically by the Legislature in G. L. (Ter. Ed.) c. 33, § 41.

They include in subdivision (*a*) of said section 41 uses by military units for social activities or athletics or for drill purposes by drill teams, bands or drum corps of war veterans' organizations.

By the terms of subdivision (*c*) of said section 41 armories may also be used under certain conditions temporarily for certain specifically named public purposes which, as set forth therein, are as follows:

A public meeting, or hearing, held by a State department, board or commission.

An examination conducted by the division of civil service.

A meeting of an organization composed of certain veterans, or their auxiliaries, a board of trade, a chamber of commerce, or a meeting to raise funds for any non-sectarian charitable or non-sectarian educational purposes.

A meeting to raise funds for a benefit association of policemen or firemen.

Meetings of military organizations of scholars in the public schools.

Elections, primaries or caucuses, and town meetings.

Meetings or rallies of a political or municipal party, as defined in section one of chapter fifty.

A meeting of an organization of boys or girls under eighteen years, or of a student military organization of a designated type.

Under subdivision (*d*) of said section 41 an armory may be used for a short period for certain designated exhibitions of the products of labor, agriculture or industry.

There has been no authority granted by the Legislature to any officer of the Commonwealth to grant the use of armories for any purpose or use other than those above set forth.

However, in any particular instance where application is made for the use of an armory for other purposes than those of military employment by the organized militia, the officer charged with the duty of granting permission for armory use must determine as a matter of fact whether the purpose for which an armory is proposed to be used by those applying comes within any of the purposes designated by the Legislature and above set forth. If it does come within any of them he may grant the desired permission, all other necessary conditions having been complied with. If it does not, it is his duty to refuse such permission.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Minimum Fair Wage Law — Females — Minors — Discrimination.

JAN. 14, 1946.

Recess Commission on Wage and Hour Standards.

DEAR SIRS: — I am in receipt from you through your secretary of the following letter:

"This commission today instructed me to request your opinion as to whether the 'equal pay for equal work law' enacted by the Legislature at the 1945 session applied to men as well as to women.

The commission then wishes to know if this law should apply, would men then come under the minimum wage orders issued by the department of labor and industries for women and minors in certain industries."

The "equal pay for equal work law" to which you refer is, I assume, G. L. (Ter. Ed.) c. 140, §§ 105A — 105C, which sections were inserted by St. 1945, c. 584, § 3.

The Attorney General, following a long line of practice and procedure of this department, does not make general interpretations of statutes nor define generally how a statute may be applied under unspecified conditions, especially when, as in the present instance, the indicated statute has not been the subject of judicial consideration.

However, for your guidance, let me say that it appears that the intent of the Legislature as expressed in said sections 105A to 105C was to forbid and penalize an employer who discriminates against an employee in the payment of the employee's wages because of the employee's sex. In this sense the said sections may be said to apply to both men and women, though the explicit provisions of the second clause of the first sentence of said section 105A indicate that a purpose of the statute, perhaps its principal one, was to forbid the use of differentials in wages prejudicial to female employees.

No provisions of said sections 105A to 105C purport to affect the minimum fair wage law for women and minors. G. L. (Ter. Ed.) c. 151, as amended. There is no authority conferred on anyone under said chapter 151 to establish minimum wage rates for men. It is doubtful if an employer required by orders made under chapter 151 to pay a certain mini-

mum wage rate to women could properly be said, as a matter of law, to "discriminate" against a male employee by paying him at a rate less than said minimum, since such minimum was established not by the employer himself but by officers of the Commonwealth.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement System — Employees in Department of Mental Health — Employees at State Farm.

JAN. 15, 1946.

HON. JOHN E. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — You have directed my attention to G. L. (Ter. Ed.) c. 32, § 3, par (2) (*g*), sub. par. "Group B," as amended by St. 1945, c. 658, § 1, and have asked my opinion as to whether the provisions of such section include within the sweep of "Group B" those employees in the Department of Mental Health who have the care and custody of insane persons.

I am of the opinion that all such employees of the Department of Mental Health are included as members of "Group B" of the retirement system by the said provisions, and that such inclusion is not limited to those employees of the said department who have the care and custody of insane persons or defective delinquents at the State Farm.

The pertinent portions of said . 3, par. (2) (*g*) read:

"Department heads shall furnish to the board (the appropriate retirement board) . . . a statement . . . of each employee in his department and thereupon the board shall classify each member in one of the following groups:

. . . . . .

Group B. — Members of police and fire departments not classified in Group A, members of the police force of the metropolitan district commission, capitol police, conservation officers paid as such, district fire wardens, coastal wardens in the department of conservation, and employees of the commonwealth and of any county, regardless of any official classification, whose regular and major duties require them to have the care and custody of prisoners or insane persons or of defective delinquents at the state farm."

I am of the opinion that the word "or" as used by the Legislature in the last and the next to the last line of the above-quoted paragraph concerning Group B was employed in a disjunctive rather than a conjunctive sense, as it sometimes is, and is here synonymous with "and" so that the words "at the state farm" at the end of said paragraph were not intended to and do not limit the meaning of the words "employees of the commonwealth and of any county . . . whose regular and major duties require them to have the care and custody of prisoners or insane persons" (see *Gaynor's Case*, 217 Mass. 86, 89, 100). Such a limitation arising from the phraseology of the words "at the state farm" is applicable only to such employees as have the care and custody of defective delinquents.

I am confirmed in my opinion by a consideration of the fact that whether or not there are defective delinquents confined at the present time elsewhere than at the State Farm, departments for defective delinquents may at any time be established at the Massachusetts Reformatory or at any

other place or places approved by the Governor and Council and defective delinquents may be committed to such departments by the courts (G. L. (Ter. Ed.) c. 123, §§113, 117, as amended), and also by the fact that the employees referred to in the phrases under consideration are "employees of the commonwealth and of *any county*," and that county employees have no duties in regard to prisoners or insane persons at the State Farm.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Merrimack Valley Joint Sewerage Board.

JAN. 25, 1946.

HON. THOMAS A. BERRIGAN, *Chairman, Merrimack Valley Joint Sewerage Board.*

DEAR SIR: — In reply to the questions contained in your recent letter, Res. 1945, c. 62, confers no power on the joint board relative to disposal of sewage in the Merrimack River valley, other than to make an investigation and study, including plans, maps and estimates and including access to all plans, reports and specifications relative to sewerage and sewage disposal of any of the cities and towns mentioned in the resolve, and to consider and report to the General Court a plan for such sewage disposal. For the foregoing purposes, the joint board is authorized to employ necessary engineering and other assistants and to expend an amount not exceeding $35,000.

By St. 1936, c. 420, § 6, which act appears to supersede St. 1935, c. 446, the Merrimack River Valley Sewerage Board was authorized to construct, maintain and operate, subject to the approval of the Department of Public Health, sewerage works for the district created by section 1 of that act. By section 12 of said act, that board was authorized to receive Federal funds for the work. The foregoing provisions are, however, made inoperative by section 16 thereof after January 1, 1938, unless, in the meantime, funds for the purpose of carrying them out have been allocated by the Federal Government under authority of appropriate Federal legislation. I assume that if there had been any such Federal allocation prior to January 1, 1938, you would have known of it.

I have caused all the acts and resolves cited by you to be examined and have also considered St. 1945, c. 74, § 2. None of them, in my opinion, operate to extend beyond January 1, 1938, the limit of time mentioned in St. 1936, c. 420, § 16, and I have been unable to find any other legislation granting such an extension. Therefore, I make reply to your express questions as follows:

1. The Merrimack River Valley Sewerage Board has no power, acting alone or jointly with the Department of Public Health, to request and accept funds from the Federal Government, either as loan or gift, to cover engineering cost for sewerage projects in the Merrimack River valley.

2. The foregoing answers your second question as to the power of the joint board.

3. As to your third question, I am of opinion that the joint board is not authorized to incur obligations in excess of the sum of $35,000 to which its expenditures are limited by Res. 1945, c. 62.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Bonus — Temporary Member of United States Coast Guard Reserve.

JAN. 30, 1946.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — I am in receipt from you of the following letter:

"I respectfully request a formal opinion from your office relative to whether or not a temporary member of the United States Coast Guard Reserve who served on a full time basis with pay is entitled to receive the bonus provided by St. 1945, c. 731."

I am of the opinion that a temporary member of the United States Coast Guard such as you have described in your letter is entitled to receive the so-called "bonus" provided by St. 1945, c. 731.

In an opinion which I rendered to you on August 27, 1945, I stated that you might legally pay the said "bonus" to "men who have served in the United States Coast Guard Reserve and possess the necessary qualifications set forth in said chapter 731."

I am informed by advices from the United States Coast Guard:

"All persons enlisted in the regular establishment of the Coast Guard are originally enlisted in what is called a Special Temporary Enlistment. This contract terminology continues for six years. This six year period is a kind of probationary period during which time such enlisted personnel are not entitled to retirement with pay nor to payment by the Coast Guard for any physical disability incurred in line of duty. At the termination of this probationary period they may re-enlist in the regular establishment provided they are physically, professionally, and morally qualified and then they become eligible for retirement and payment for service incurred disability. The Special Temporary Enlistment contract is printed on green paper and the regular contract is printed on white paper. They are popularly referred to as 'green ticket' and 'white ticket' respectively. Men in both classes of enlistment are members of the regular United States Coast Guard, perform all duties of Coast Guard, are classed as veterans and are entitled to all of the rights and benefits of the G. I. Bill of Rights.

"The Special Temporary Enlistment should in no way be confused with that branch of the Coast Guard called the Temporary Reserve which was composed of civilian volunteers for part time service."

In view of the foregoing statement as to the status of temporary members of the Coast Guard, it would appear that all those persons who were enlisted by the Special Temporary Enlistment became members of the United States Coast Guard Reserve, as those words were used in my previous opinion, and as such are entitled to the "bonus."

Such persons so enlisted are not, as the Federal authorities have pointed out, to be confused with those serving in the "Temporary Reserve" as civilian volunteers for part time service only, who cannot properly be said to have become members of the United States Coast Guard Reserve within the meaning of the said previous opinion and consequently do not appear to be entitled to receive the "bonus."

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Military Leave of Absence — Return to Service — Time.

Feb. 6, 1946.

Dr. Clifton T. Perkins, *Commissioner of Mental Health.*

Dear Sir: — In a recent letter you have asked my opinion as to whether you may fill the position of a certain person in your department by a permanent appointment. Although the facts with relation to the employment of such person are not stated in detail in your letter to me, I assume, from the context of your communication, that such person terminated his service with the Commonwealth on July 1, 1941, for the purpose of serving in the military forces of the United States; that a year from the termination of such military service has not yet elapsed; that such person has expressed in writing his intention of not returning to such position.

St. 1941, c. 708, as amended by St. 1943, c. 548, provides that a person terminating his service with the Commonwealth for the purpose of serving in the military forces of the United States and serving therein shall be deemed to be on leave of absence and no such person shall be deemed to have terminated his service with the Commonwealth until the expiration of one year from the end of his military service. Provision is also made for filling the position of such person until his return from such leave of absence.

It is not provided that a person on such a leave of absence may renounce the right of return to his position before a year has elapsed after the termination of his military service. It appears to have been the intent of the Legislature, as expressed in said chapters 708 and 548, to give to a soldier an absolute right to the full period of one year after the termination of military service in which to return to the employ of the Commonwealth if he desires and his condition warrants. He cannot estop himself from exercising this right.

You have informed me that the position in question is not under civil service; if it were, the period for return would be two years instead of one. (St. 1945, c. 610.)

It follows that the position of the person in question may not at the present time be filled by a permanent appointment.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Department of Labor and Industries — Qualifications of Members appointed by Governor.

Feb. 14, 1946.

His Excellency Maurice J. Tobin, *Governor of the Commonwealth.*

Sir: — I am in receipt of the following communication from Your Excellency's office:

"G. L. (Ter. Ed.) c. 23, § 1, provides as follows:

'There shall be a department of labor and industries, under the supervision and control of a commissioner of labor and industries, in this chapter called the commissioner, an assistant commissioner, who shall be a woman, and three associate commissioners, one of whom shall be a representative of labor and one a representative of employers of labor.'

His Excellency Governor Tobin respectfully requests your opinion with relation to the qualifications of an associate commissioner, as to whether 'a representative of employers of labor' must be an individual actually in business and employing people under him, or whether the requirement is simply that this representative of the board be considered as representing the interests of employers of labor irrespective of the question of his personal status as an employer of labor."

I am of the opinion that the phrase "one of whom shall be a representative of labor and one a representative of employers of labor" was *not* used by the Legislature as requiring merely that persons selected as such representatives by the Governor shall by force of such selection be considered as representing the interests of "employers of labor" or representing "labor" respectively, irrespective of their personal relation to "labor" or to the employment of "labor."

I am of the opinion that the intent of the Legislature was to require that the Governor should appoint persons who were in fact representative of those who labor, on the one hand, and of those who are "employers of labor," on the other. It would seem that such persons, to be real representatives of "labor" or of "employers of labor" as the quoted words are used in said section 1, would be, at the time of appointment, individuals who were or had been employees engaged in "labor," in the one instance, and those who were or had been employers of "labor," either directly or as officers of corporations or organizations employing "labor," in the other.

In their original form (St. 1912, c. 726, § 1) the provisions of said chapter 23, section 1, required that the Governor appoint as two of the members of the then State Board of Labor and Industries "an employer of labor" and "a wage-earner." By Gen. St. 1919, c. 350, Pt. III, § 70, which abolished the old board and established the Department of Labor and Industries, the words "an employer of labor" and "a wage-earner" were changed to those employed in the present form as embodied in said chapter 23, section 1, "a representative of labor" and a "representative of employers of labor." In the measure first introduced into the House in 1919, from which chapter 350 was evolved (1919, H. 1830), the applicable provision as to associate commissioners whom the Governor was authorized to appoint was "one of whom shall be a representative of labor." Later, on the floor of the House, this phraseology was amended so as to read as at present: "one of whom shall be a representative of labor and one a representative of employers of labor."

In construing a statute relating to the same subject matter as that of a prior one which has been done away with, the phraseology of the earlier may be considered in placing a construction upon the later one (*Commonwealth* v. *Bralley*, 3 Gray, 456). It does not appear that in making these verbal changes the Legislature intended to indicate that a person who had never occupied the status of an employee (called a wage-earner in the earlier statute) or one who had never been connected with the employment of workmen might be deemed to be "a representative" of labor or of "employers of labor," as the case might be.

It is plain that under the terms of the said act of 1912 the Governor was required to appoint to the board one employer and one employee, thus assuring both employees and employers of members who would understand the particular needs and problems of each group. I am of the opinion that the change in phraseology adopted by the Legislature in 1919 does not indicate an intention on the part of that body to alter the assurance of

such representation to each of the two groups. Nor am I of the opinion that by the use of the words "a representative of" in said chapter 350, section 70, and said chapter 23, section 1, the General Court intended to so enlarge the class of persons from whom the Governor might appoint the associate commissioners in question as to include professional men, such as lawyers or technical advisers connected with employees or employers only by contracts for services.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Conservation Officers in the Division of Fisheries and Game.

FEB. 18, 1946.

Hon. ARCHIBALD K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — In a recent letter you have asked my opinion as to whether or not "it is lawful to have supervising conservation officers in the Bureau of Law Enforcement of the Division of Fisheries and Game."

I advise you that it is lawful to have such officers.

G. L. (Ter. Ed.) c. 21, § 7, as amended, authorizes the director of the said division, with the approval of the commissioner, to appoint and remove "conservation officers . . . and other assistants."

Section 6A of said chapter 21 provides that there shall be in the Division of Fisheries and Game a "bureau of law enforcement, under the charge of a chief conservation officer," and further provides that "all conservation officers, deputy conservation officers . . . shall be assigned to duty in said bureau."

There is nothing in the phraseology of the statute to prevent the establishment among "conservation officers" of the positions of "supervising conservation officers," provided that these positions be properly established under the rules of the Department of Administration and Finance applicable to its Division of Personnel and Standardization.

I am advised that several of such positions have previously been so established and have been officially classified by the Division of Personnel and Standardization under the provisions of G. L. (Ter. Ed.) c. 30, §§ 45–49, and, furthermore, are now in existence, are classified by the Division of Civil Service, and are subject to its rules and regulations.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Port of Boston — Construction — Lease — St. 1945, c. 619, § 10.

FEB. 21, 1946.

Hon. H. J. NICHOLS, *Chairman, Port of Boston Authority.*

DEAR SIR: — In a recent communication you request my opinion relative to the proviso in St. 1945, c. 619, § 10, which reads as follows:

"provided, that no construction, to be paid for from the proceeds of the bond issue hereby authorized, shall be done unless the Authority shall have first executed a written contract, approved by the governor, with a

responsible party providing for the lease of said property, the minimum requirements of which shall be *at a rate* sufficient to amortize sixty per cent of the actual cost to the commonwealth of the facilities included in the lease, over a period not to exceed twenty years, which contract may provide that at the expiration of the term of the lease it may, at the option of the lessee, be renewed for a further period of twenty years; and provided, further, that no expenditure or commitment from the proceeds of said bond issue in excess of five million dollars shall be made without further authorization by the general court therefor."

The words, "at a rate", which you emphasize in your letter, are also emphasized in the above quotation, although no particular emphasis appears in the statute itself.

It seems probable that the authors of the above proviso supposed that they were authorizing construction to be made by the Boston Port Authority only in cases where there is already in existence, at the time of the construction, a contract for a lease which will provide for reimbursing the Commonwealth in twenty years or less to the extent of not less than sixty per cent of the cost of the project, *during the term of that lease;* but nowhere in the proviso, or elsewhere in the statute, is there any provision limiting the period of such reimbursement to the term of the lease. Therefore, I am inclined to the opinion that, under the express terms of section 10 of said chapter 619, the Boston Port Authority has power to acquire property and construct facilities within a total expenditure and commitment of five million dollars, provided it has already executed a written contract approved by the Governor with a responsible party providing for the lease of the property proposed to be constructed, if the agreed rental is at a rate sufficient to amortize in less than twenty years sixty per cent of the actual cost to the Commonwealth of the leased property, including construction and all other expenses, irrespective of the term of the lease.

However, the matter is not entirely free from doubt. Chapter 619 of the Acts of 1945, like chapters 653 and 665 of that year, and like chapter 714 of the Acts of 1941, appears to contemplate the carrying out of port improvement projects which shall be self-liquidating. It is a well-known principle of statutory construction that the spirit of a law, if clearly appearing, will prevail over its letter. While I am of opinion that said chapter 619 does not require a lease entered into before beginning construction of a port improvement to be self-liquidating during its term, the possibility cannot be ignored that a different construction might be reached in the event of litigation.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Insurance — Life Policy — Waiver of Premiums.

FEB. 21, 1946.

Hon. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — In a recent communication you have asked my opinion as to whether you may properly approve a policy of life insurance form which includes a waiver of premiums "in the event of the total and perma-

nent disability of the person who pays the premiums on the policy and who is the owner thereof (usually the parent of a minor child who is insured thereunder)" but is not the one whose life is insured.

I am of the opinion that you cannot properly approve such a policy in view of the pertinent statutory provisions. The applicable statute by virtue of which life companies may provide for accidental death benefits and for the waiver of premiums is, as you have indicated, section 24 of G. L. (Ter. Ed.) c. 175. The relevant portion of this section in its first paragraph reads:

"Any life company . . . may provide in its policies of life . . . insurance . . . for the payment of an accidental death benefit . . . and may incorporate therein or in its annuity or pure endowment contracts . . . provisions for the waiver of premiums or for the granting of special benefits in the event that the insured, or either of them, or the holder, as the case may be, becomes totally and permanently disabled from any cause."

The word "insured" as used in said section 24 has been held in an opinion of one of my predecessors in office not to include "a beneficiary" (Opinion of the Attorney General to the Insurance Commissioner, October 7, 1931). The word "holder" in connection with a life insurance policy has been variously defined in judicial opinions depending upon the context in which it is used. It has sometimes been said to signify an insured, sometimes a beneficiary, and sometimes has been said to be synonymous with "owner."

Irrespective of the meaning which may be given to the word "holder," with respect to a policy of life insurance, the manner in which that word has been employed by the Legislature in said section 24 indicates that in the quoted portion of said section it is used not with reference to a policy of life insurance but solely with reference to an annuity or a pure endowment contract, so that it follows that a "holder" of a policy of life insurance is not one who may be made the recipient of the benefits of a provision for the waiver of premiums.

Prior to 1929, said section 24, as then embodied in chapter 175 of the General Laws of 1921, provided only that provisions for the waiver of premiums might be incorporated in policies of life insurance for the benefit of the insured. By St. 1929, c. 235, the benefits of such provision for waiver of premiums were authorized to be made applicable to "annuity or pure endowment contracts." The words "annuity or pure endowment contracts" were inserted in the provisions of the section and the words "or the holder as the case may be" were inserted after the phrase, which had previously stood alone, "the insured or either of them" so that the section then read as it does now in the above-quoted portion.

In my opinion, it is apparent that the Legislature by so using the word "holder" in connection with the phrase "as the case may be," intended that "holder" should be read only with relation to "annuity or pure endowment contracts" and did not intend that it should signify the "holder" of a policy of life insurance. The section as it now stands indicates a legislative intent that provisions for the waiver of premiums might be made only for the benefit of those insured under life policies or for the benefit of those who are holders of annuities or pure endowment contracts.

If it be thought that the language of section 24 is ambiguous or if it be desired to extend the benefits of premium waivers to others than those

who are the insured under policies of life insurance, resort should be had to the General Court for clarification or enlargement of the existing provisions of the statute.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Insurance — Employees of Insurance Company — Contributory Pension System — Commissioner.

FEB. 25, 1946.

Hon. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — I am in receipt from you of the following letter:

"Three domestic mutual insurance companies which pool their business have submitted to this Department, as required by G. L., c. 175, § 36, a Contributory Retirement Plan covering such employees as are engaged in handling automobile risks. The Plan provides benefits for all of the employees of two of the companies but does not provide coverage for all of the employees of the third company some of whom are employed in connection with other lines of insurance and whose place of employment is at a point other than that at which the employees covered by the Plan are employed.

The pertinent portions of the applicable statute read as follows:

'Any such (domestic) company, with the written approval of the commissioner, may also establish an employee's savings fund, contributory pension system or association for the benefit of its aged or disabled employees, to which fund, system or association both the employees and the company shall contribute. . . . The term "employee" as used in this section shall include an officer.'

Will you please advise us as to the following:

1. Is the approval of the Commissioner referred to in the statute a ministerial act permitting no exercise of discretion?

2. If the answer to the foregoing question is in the negative, what standards should guide the Commissioner in the exercise of his discretion when acting under section 36?

3. Is the Commissioner authorized under this statute to approve a Contributory Pension Plan which an insurance company proposes to establish if such plan does not provide benefits for all of the employees of the company on account of differences in the nature of employment or of the location of the employee?

4. May the Commissioner disapprove a Plan such as that outlined above if in his judgment it is discriminatory in that certain employees of the company are not included in the coverage on account of differences in the nature of employment or of the location of the employee?"

I answer your first question in the negative.

In answer to your second question I must state that the Attorney General, following a long line of practice and procedure of this department, does not attempt to set up the standards which should guide officials in exercising discretionary authority. Sound judgment, good business sense, and actuarial knowledge will suggest the details which the commissioner should take into consideration in giving or withholding his approval of any particular contributory pension system.

In answer to your third and fourth questions I advise you that since the applicable statute does not specifically require the inclusion of all the employees of a company in a contributory pension system, the fact that a given plan omits from its sweep some of the employees of a company "on account of differences in the nature of employment or of the location of the employee" does not of itself require the commissioner to refrain from approving the plan, and the mere fact of such omission would not justify the commissioner in refusing to give his approval.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Chiropody — Approval of School.

FEB. 25, 1946.

MRS. MAE MANNING, *Director of Registration.*

DEAR MADAM: — You have submitted to me a request for my opinion as to whether the Board of Registration in Chiropody, having once approved a "school of chiropody (podiatry)" under the provisions of G. L. (Ter. Ed.) c. 112, § 16, may thereafter by vote withdraw its approval.

In my opinion the board may not withdraw such approval.

The Legislature in said section 16 has established in detail a system by which a school may seek to obtain the board's approval. The Legislature has not specifically authorized the board to withdraw the approval, once such approval has been given either by the board or by the Superior Court acting upon petition when the board has declined a request by a school for approval. No implication of a grant of authority to withdraw an approval appears to exist as a corollary of such power to approve, in view of the whole context of said section 16, which shows a legislative intent to protect a school by direct resort to the courts against the possibility of improper disapproval by the board. The Legislature, in enacting the provisions of said section 16, appears to have contemplated that, although there might be several refusals to approve a school, when such approval was at last given it should be final. Consequently, when the board has approved a school it has exhausted its authority with relation to granting or withholding approval and may not act further in the matter.

In so far as an opinion of one of my predecessors in office given to the then Director of Registration on January 21, 1943, expresses views at variance with those which I have set forth herein, I do not concur with it.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Metropolitan District Water Supply Commission — Use of Lands Acquired.

FEB. 26, 1946.

Metropolitan District Water Supply Commission.

GENTLEMEN: — Under date of February 21, 1946, you have asked as to whether lands acquired by the commission, either by purchase or eminent domain, used for reservoirs or watersheds, can be used for any other use outside the purpose or purposes for which they were originally taken.

Generally, I must answer your question in the negative, with two possible conditions upon which another use may be granted. St. 1926, c. 375, § 7, empowers the commission to sell at public or private sale, exchange or lease any property, both real and personal, or any easement or water right which in the opinion of the commission is no longer needed for the purposes of that act.

G. L. (Ter. Ed.) c. 131, § 89, provides that authorities or persons having control and charge of a State reservation, park, common, or any land owned or leased by the Commonwealth, or any political subdivision thereof, or any land held in trust for public use, may, with such limitations as they may deem advisable, authorize persons to hunt within said boundaries any of the unprotected birds specifically named in section 53 of said chapter 131, or fur-bearing mammals mentioned in section 68 of the chapter, or foxes, weasels or wildcats. In that section there is contained this language:

"Nothing in this section shall be deemed to prohibit the metropolitan district commission from permitting the hunting of any bird or mammal during the legal open season on the same in any area under its control."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Metropolitan District Commission — Lease of Lands Acquired.

FEB. 27, 1946.

Metropolitan District Commission.

DEAR SIRS: — You have asked my opinion as to whether your commission may sell or lease a certain parcel of land "bounded by Brookline Street, Memorial Drive, Granite Street and Magazine Street."

I am advised that this parcel is a part of land acquired by the city of Cambridge in 1897 for park purposes and subsequently conveyed by it to the Commonwealth under authority of St. 1920, c. 509, without consideration, for park purposes.

It was provided in said chapter 509 that upon conveyance of the said land to the Commonwealth the Metropolitan District Commission was to have all the powers and duties in respect to it which were conferred upon the older Metropolitan Park Commission by St. 1893, c. 407. Among the rights so conferred, a limited right to dispose of lands had been conferred upon the latter commission by St. 1895, c. 450, § 2, in the following language:

"Said commission, with the concurrence of the majority of the board of park commissioners, if any, in the city or town in which the property is situated, may at any time sell . . . any portion of the lands or rights in land, the title to which has been taken or received or acquired *and paid for by it*, and may . . . execute and acknowledge a deed thereof, . . . in the name and behalf of the Commonwealth . . ."

The Metropolitan Park Commission had been authorized by section 3 of said chapter 450 to accept and maintain as a portion of the public reservations any lands given to the Commonwealth which lay within the limits of the Metropolitan Parks District or immediately contiguous to them.

The provisions of said section 2 as applicable to your commission are now embodied in G. L. (Ter. Ed.) c. 92, § 85, from which it appears that your commission has authority, with the concurrence of municipal park commissioners, to sell any portion of lands "the title to which has been taken or received or acquired *and paid for by it*" for the purposes set forth in sections 33 and 55 of said chapter 92, which are for public reservations of land used for park purposes and boulevards.

The authority given by said chapter 450, section 2, and by said chapter 92, section 85, to the commission to sell lands devoted to park or reservation purposes is specifically limited to the sale of such lands which have been received or acquired and paid for by the Metropolitan District Commission or the Metropolitan Park Commission, as the case may be. It appears to have been the intent of the Legislature, as expressed in said sections 2 and 85, to except from the power to sell those lands which are received by way of gift and which would ordinarily be, as in the instant case, conveyed by the givers for the express purpose of having them devoted to park or reservation usages for the benefit of the general public.

It follows that since the land in question was not paid for by the Metropolitan Park Commission it may not now be sold by your commission.

No authority is conferred upon your commission to lease such land for the purpose of having a high school building erected thereon by a private person or corporation, for such a purpose would not be one consistent with the purposes for which the land is to be used under the terms of the gift and the provisions of G. L. (Ter. Ed.) c. 92, § 33, concerning park and reservation land, as specified in section 83 of said chapter 92.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Board of Registration of Barbers — Qualifications of Members.

MAR. 4, 1946.

His Excellency the Governor and the Honorable Council.

DEAR SIRS: — I am in receipt from your Executive Council of the following communication:

"I have been directed by the Governor and Council to request an opinion from you as to whether or not Charles J. Daggett, 23 Maple Street, Springfield, nominated by His Excellency as a member of the Board of Registration of Barbers is qualified under Chap. 13, G. L., Sec. 39 to hold such an appointment.

Mr. Daggett is a licensed barber and has been for many years. For the past twelve years, he had been employed as an inspector for the Board of Barbers, during which time he had practised his profession in his spare time, especially on week-ends and during vacation periods.

For a period of twelve years prior to his appointment as an inspector, he worked full time at his profession."

G. L. (Ter. Ed.) c. 13, § 39, with relation to the necessary qualifications to be possessed by members of the Board of Registration of Barbers, provides in its pertinent parts as follows:

"There shall be a board of registration of barbers . . . to consist of three members, citizens of the commonwealth, *each of whom shall be a*

practising barber and shall have had five years of practical experience as a barber in this commonwealth prior to his original appointment and *shall have been actively engaged in the occupation of barbering in this commonwealth for not less than six months during the twelve months immediately prior to such appointment*, and at least one of whom shall be a journeyman barber."

It is also provided in section 40 of said chapter 13 that:

"The board may appoint investigators who shall be citizens of the commonwealth, shall have had at least five years continuous practical experience as barbers and are registered under section eighty-seven G of chapter one hundred and twelve."

The Attorney General does not pass upon questions of fact.

It would appear from such facts as are set forth in said communication that the inspector in question was, from the fact that he had been appointed as an inspector under the provisions of said section 40, a citizen of the Commonwealth, that he had four years' practical experience as a barber and so would appear to be qualified for the office of a member of the said board; provided that he also possessed the further qualification required for the holder of such office, namely, that he had "been actively engaged in the occupation of barbering in this commonwealth for not less than six months" during the past year.

Whether or not such inspector was "*actively* engaged in the occupation of barbering" during the past year is a question of fact for your determination. If he was so engaged it would appear that he possessed the necessary qualifications established by the Legislature for a holder of the office in question. If he was not so engaged it cannot be said that he possesses all of such necessary qualifications.

Your communication to me states, in regard to this particular matter, only that the said inspector had been employed as an inspector for the past twelve years "during which time he had practised the barbering profession in his spare time, especially on week-ends and during vacation periods."

As to how much time off an inspector of barbering is allowed from his work for the Commonwealth I am not advised, nor am I informed as to the circumstances under which this inspector practised his profession during the past year in such spare time, whether regularly at a fixed place of business or in some other manner, nor as to the actual amount of time which he devoted "for not less than six months during the twelve months" last past to the occupation of barbering as distinguished from the duties of an inspector of barbering. Information as to such matters would appear to be necessary for your determination of the facts with regard to the inspector's relation to the occupation of barbering during the past year while at the same time performing his official duties.

While it cannot be said as a matter of law that under no circumstances could such an inspector while performing his official duties be "*actively engaged* in the occupation of barbering," yet the proof of such active engagement in the said occupation, during incumbency of an official position entailing not inconsiderable duties, would appear to require a showing of somewhat unusual factual considerations.

Very turly yours,

Clarence A. Barnes, *Attorney General.*

Department of Conservation — Removal of Slash.

MAR. 5, 1946.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — In a recent letter with relation to G. L. (Ter. Ed.) c. 48, § 16, as amended by St. 1943, c. 103, in connection with the duties of the State Forester under sections 19 and 20 of said chapter 48 with regard to slash and the institution of criminal proceedings for failure to remove the same, you have asked my opinion upon four questions of law as follows:

"1. Does this law impose responsibility on the owner, lessee, or occupant of lands only?

2. If a person buys standing timber from a landowner and cuts the timber, does this require him to remove the resulting slash?

3. If the answer to our second question is in the affirmative can the Division of Forestry elect to prosecute either the owner, lessee, tenant or occupant of the land or the person who purchased the timber for cutting?

4. In the event that title to the land passes after the timber is cut and before the slash is removed, can the new owner be held responsible even though he neither cut nor permitted the cutting of wood or timber on that land?"

Said section 16 reads:

"Every owner, lessee, tenant or occupant of lands or of any rights or interests therein, except electric, telephone and telegraph companies, who cuts or permits the cutting of brush, wood or timber on lands which border upon woodland of another or upon a highway or railroad location, shall dispose of the slash caused by such cutting in such a manner that the same will not remain on the ground within forty feet of any woodland of another, or of any highway or railroad location."

1. In answer to your first question, I advise you that the statute by its explicit words imposes certain duties upon the "owner, lessee, tenant or occupant of lands" and upon the owner, lessee, tenant or occupant of "any rights or interests" in lands.

2. I answer your second question in the affirmative.

I am of the opinion that the Legislature intended to include within the meaning of the phrase "owner . . . of lands or of any rights or interests therein" the buyer of standing timber.

In the original statute from which said section 16 is derived, St. 1914, c. 101, § 1, the words "and every owner of *stumpage*" were set forth after the phrase "every owner, tenant or occupant of land." Stumpage is often properly employed as a matter of law as meaning timber standing in the tree on land (38 C. J. 145 N. 26) and it was apparently so employed by the Legislature in said St. 1914, c. 101, § 1.

It is plain that as the statute stood in 1914 not only was the owner of land as such required to care for slash, but the owner of timber in standing trees was also required to care for the slash resulting from cutting the trees.

In 1920, the Legislature, acting upon a report of the State Forester, which suggested that the existing provisions for the removal should be made more effectual (1920 House Document 395), repealed said chapter 101 and enacted a similar but more extensive statute (St. 1920, c. 308).

The first section of said chapter 308 amended section 1 of said St. 1914, c. 101, into the present form of said section 16 of G. L. (Ter. Ed.) c. 48 by dropping out the word "stumpage" and using in place thereof the phrase "owner . . . of lands or of any rights or interests therein" as now appearing in said section 16.

In construing the phraseology of a statute it is permissible to consider the wording of an earlier statute dealing with the same subject matter, as well as the legislative history of the statute in question. *Ham* v. *Boston Board of Police*, 142 Mass. 90; *Hamilton* v. *Boston*, 14 Allen 475; *Holbrook* v. *Bliss*, 9 Allen 69, 75.

I am of the opinion that in employing the phrase "any rights or interests" in lands in place of the word "stumpage" previously used, the Legislature did not intend to lessen the classes of persons who were to be required to care for slash but rather to increase them in view of the said State Forester's report which was before the General Court, so that it intended that the owner of standing timber should be comprehended within the broad sweep of the words "owner . . . of any rights or interests" in lands.

I am not unaware of the fact that in Massachusetts, unlike the majority of the States of the Union (*Brown* v. *Bishop*, 105 Me. 272), our Supreme Judicial Court, in various opinions dealing with the rights of vendors and vendees of timber, has said that with regard to such rights the general rule is that a contract for the sale of standing timber to be cut is construed as passing an interest in the trees when they are severed from the land rather than as granting a right or interest in land (*Fletcher* v. *Livingston*, 153 Mass. 388, 390; *Hanifin* v. *C. & R. Construction Co.*, 313 Mass. 651, 658). I am of the opinion, however, by reason of the considerations which I have set forth herein, that the Legislature did not use the phrase "owner . . . of any rights or interests" in a narrowly technical sense, but intended to include within its meaning the owner of standing timber as distinguished from the owner of land as such, precisely as it had done in St. 1914, c. 101, § 1, by the use of the phrase "and every owner of stumpage."

3. The considerations which I have set forth in answering your second question make it necessary for me to answer your third question in the affirmative.

4. I answer your fourth question to the effect that a new owner of land who acquired title after timber had been cut on it but before slash had been removed cannot be liable for a failure to remove such slash under the provisions of said section 16, since he did not cut the timber nor permit it to be cut. The language of said section 16 is unambiguous in this respect. The practical importance of provision for the care of the slash by the buyer of the timber who has cut or permitted the cutting of the trees becomes apparent when there is a change in the ownership of the land itself such as you have described in your fourth question.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State Boxing Commission — Authority to Regulate Simultaneous Boxing Exhibitions.

MAR. 6, 1946.

State Boxing Commission.

DEAR SIRS: — I am in receipt from you of a letter asking my opinion upon two questions of law in connection with the authority of your board

to deal with the matter of conflicting dates for boxing exhibitions in a city under the provisions of G. L. (Ter. Ed.) c. 147, §§ 32 to 51, which is the statute regulating licensed boxing matches.

These questions read:

"Will you please advise the Massachusetts State Boxing Commission as to whether or not there is anything in sections 32 to 47 of chapter 147, that would permit: —

(1) The Massachusetts State Boxing Commission to regulate this situation so that two clubs may not hold boxing exhibitions on the same night.

(2) If this is not specifically covered in the sections referred to — can the Massachusetts State Boxing Commissioner, by authority of law, adopt a rule that would regulate this condition?"

In answer to your questions, I advise you that the pertinent statute does not itself contain any provisions specifically relating to the regulation or prohibition of conflicting dates for boxing exhibitions. Nevertheless, your commission has been given broad powers to make rules for the administration of the statute (G. L. (Ter. Ed.) c. 147, § 46) under which you have already regulated many details concerning boxing matches. I see no reason why you may not lawfully, by an appropriate rule, regulate the matter of conflicting dates for licensed boxing matches or exhibitions. Such a rule must, of course, be approved by the Governor and Council, as provided in said section 46, before it can become effective.

The mere fact that at the present time two or more licensed boxing matches are held by various clubs at the same time would not appear to constitute "an act or offense detrimental to the public interest" for which a license might be revoked under section 42 of said chapter 147, as you seem to suggest in the paragraph of your letter which follows the said questions.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Milk Control Board — Authority of State Auditor to Examine Various Accounts.

MAR. 8, 1946.

Milk Control Board.

DEAR SIRS: — You have asked my opinion as to whether or not certain records or documents of the Milk Control Board should be made available by your board to the State Auditor for the purpose of an audit of the accounts of your board by the Auditor pursuant to the provisions of G. L. (Ter. Ed.) c. 11, § 12, which provide as follows:

"The department of the state auditor shall annually make a careful audit of the accounts of all departments, offices, commissions, institutions and activities of the commonwealth, including those of the income tax division of the department of corporations and taxation, and for said purpose the authorized officers and employees of said department of the state auditor shall have access to such accounts at reasonable times and said department may require the production of books, documents and vouchers, except tax returns, relating to any matter within the scope of such audit. The accounts of the last named department shall be subject at any time to such examination as the governor and council or the gen-

eral court may order. Said department shall comply with any written regulations, consistent with law, relative to its duties made by the governor and council. This section shall not apply to the accounts of state officers which the director of accounts of the department of corporations and taxation is required by law to examine. The department of the state auditor shall keep no books or records except records of audits made by it, and its annual report shall relate only to such audits."

Your letter separates the documents and records into four classes, which you have enumerated and described, and I will likewise deal with each separately:

"1. A detail list of the milk dealers who owe $280,829.81 to producers which sum of $280,829.81 as shown on page 5, paragraph 5, of the report submitted to His Excellency Leverett Saltonstall, Governor of the Commonwealth, by the Commission on Administration and Finance, under date of January 12, 1944."

It is my opinion that the data referred to in paragraph 1 need not be made available by your board to the Auditor. The report of the Commission on Administration and Finance with reference to this data states that for the period covered by the committee's investigation "551 milk dealers of Massachusetts owe producers $280,829.81 underpayments . . ." This item is related to the discharge of the duties of the Milk Control Board in its supervision and regulation of the milk industry pursuant to the Milk Control Act. An examination of this list by the Auditor has no relation to the verification of amounts received by the Milk Control Board in order to check disbursements made by said board against them. Such an examination would seem to be directed to an inspection of the status of accounts between milk dealers and producers and would appear to be an attempt to make a complete and independent investigation of conditions which might be disclosed in the course of such an examination, rather than an auditing of the accounts of the Milk Control Board, which is intended and provided for by chapter 11, section 12.

"2. A revised and more recent detail list of dealers who owe monies to producers which was prepared by the Milk Control Board."

It is my opinion that the list referred to in paragraph 2 need not be made available to the Auditor for the same reasons stated with reference to the data requested in paragraph 1.

"3. Permission for the auditor to have access to the so-called 'Milk Dealers Audit Ledger.' "

It is my opinion that the "Milk Dealers Audit Ledger," which I understand indicates the amount of money due from dealers to producers, need not be made available to the Auditor, for the same reasons stated with reference to the data requested in paragraph 1.

"4. A list of audits which were assigned to the Charles F. Rittenhouse Co., Certified Public Accountants, Boston, Mass."

It is my opinion that the data described in paragraph 4 should be made available to the Auditor, since it indicates expenditures by the Milk Control Board of funds received by it, and which expenditures should be made solely for the purpose of carrying out the provisions of the Milk Control

Act. The Auditor is entitled to examine and audit the expenditures by the Milk Control Board of any funds received by it or appropriated to it by the Commonwealth.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Metropolitan District Commission — Charge to Towns for Water in 1946.

MAR. 11, 1946.

Metropolitan District Commission.

GENTLEMEN: — In a recent letter you have asked me to rule on the charge to member towns under the provisions of St. 1945, c. 587. You have stated that member towns have already been notified that the cost of water for 1946 would be a flat rate of $40 per million gallons.

This notification is based upon a correct interpretation of the statutes governing such a charge.

G. L. (Ter. Ed.) c. 92, § 26, as amended, indicates that if the cost of producing the metropolitan water supply exceeds the amount of $40 per million gallons, this deficit is made up by apportionment upon the cities and towns of the district under said section 26. However, this chapter and section was last amended by St. 1945, c. 587.

By section 3 of said chapter 587, there is inserted a section 26A in G. L. (Ter. Ed.) c. 92, by which it is provided that:

"Beginning with the year nineteen hundred and forty-six the price for water furnished by the metropolitan water district to non-member towns and to member towns shall be fixed at forty dollars per million gallons, less any sums to be credited."

Section 26A, as inserted, further provides in substance, that if there shall be a deficit, the same shall be provided for by the sale of bonds of the Commonwealth. By section 4 of said chapter 587, it is provided that the provisions of said section 26 shall apply to "*the assessment for the year nineteen hundred and forty-five.*"

Reading the quoted portions of said sections 3 and 4 together, it would appear that it was the intent of the Legislature that the provisions of said section 26 were not to have any application except to the assessment for 1945. Unless said sections 26 and 26A be so construed in the light thrown upon them by said section 4, they would seem to be inconsistent, and statutes upon well settled principles of law are to be read, if possible, so as to avoid inconsistency.

Accordingly, the price of water to members and municipalities eligible for membership in 1946, should be $40 per million gallons, measured by the consumption for the preceding year, as provided in said section 26A.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Contracts — Bids — Authority to Reject.

Mar. 13, 1946.

Hon. Raymond W. Coburn, *Acting Commissioner of Public Works.*

Dear Sir: — With relation to a bid for proposed shed alterations at the New Bedford State Pier, which, as I am informed, your department rejected as not complying with the applicable statutes, you have in effect asked my opinion as to whether such action was proper as a matter of law.

I advise you that such action was proper.

It appears, from the information which you have given me and from the form of the bid which you have laid before me, that the low bidder did not insert in his bid the name of the subcontractor on an item for electrical alterations, although quoting a price against such item and inserting the names of other subcontractors on other items.

The proposed form furnished bidders on this contract and filled out by them was in accord with the provisions of G. L. (Ter. Ed.) c. 149, § 44C, but on page 2 of the proposal, where such bids were set forth as returned by the bidder in question under Item B-3, the particulars were set forth and the bidder wrote the unit price and amount bid in dollars and cents but did not supply in the space marked in connection with Item B-3 "Name of Sub-bidder" the name of any sub-bidder.

It is apparent from the whole context of said section 44C that it was the intent of the Legislature to require the names of subcontractors to be set forth in proposals. Subdivisions (B) and (D) of said section 44C refer to subcontractors as those "designated" or "named" in the proposed form by the general contractor and a list of sub-bidders is expressly called for by the form established by subdivision (F) (d) of said section 44C. No authority is vested in the department to waive the omission of the name of a subcontractor in a proposal and to award the contract to the bidder so omitting such name; rather, in such a situation the department properly must do as you have already done — treat the bid as not complying with the statutes. In this connection it is immaterial that the bidder claims that the omission of the name is due to oversight.

I return herewith the proposed form which was left with me.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Board of Examiners of Plumbers — Buildings Owned by the Commonwealth — Rules — Town Regulations of Plumbing.

Mar. 13, 1946.

Mrs. Mae Manning, *Director of Registration.*

Dear Madam: — On behalf of the Board of Examiners of Plumbers you have asked my opinion on the following eight questions:

Your first question is:

"1. Does Chapter 142, General Laws, apply to plumbing under Rules Relative to Plumbing in Buildings Owned and Used by the Commonwealth and formulated under authority of section 21, chapter 142, General Laws?"

All the sections contained in chapter 142 refer to cities and towns, with the exception of section 21, which specifically refers to plumbing work in buildings owned and used by the Commonwealth. The provisions of section 21 are:

"The examiners shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing work in buildings owned and used by the commonwealth, subject to the approval of the department of public health, and all plans for plumbing in such buildings shall be subject to the approval of the examiners."

This implies an intention of the Legislature to exclude from the provisions of all sections of chapter 142, with the exception of section 21, plumbing work in buildings owned and used by the Commonwealth. Chapter 142 in general provides laws with relation to plumbing in the cities and towns. Section 21 of said chapter states the laws with relation to plumbing in buildings owned and used by the Commonwealth, which are the rules made under the said section 21.

I am, therefore, of opinion that, with the exception of section 21, the other sections of chapter 142 do not apply to buildings owned or used by the Commonwealth. (See 1932 Op. Atty. Gen. 86.)

Your second question is:

"2. If the answer to the preceding question is 'no', can the Board of State Examiners of Plumbers incorporate in said rules the following: 'No person shall engage in the business of a master plumber or work as a journeyman, unless he is lawfully registered or has been licensed by the Examiners as provided in chapter 142, General Laws?"

The examiners are required by section 21 to formulate rules relative to plumbing work in buildings owned and used by the Commonwealth, subject to the approval of the Department of Public Health. Pursuant to this provision of the law, it is my opinion that the examiners, with the approval of the Department of Public Health, could incorporate in such rules the following:

"No person shall engage in the business of a master plumber or work as a journeyman, unless he is lawfully registered or has been licensed by the Examiners as provided in chapter 142, General Laws."

Your third question is:

"3. Can a town board of health legally prescribe regulations for the materials, construction, alteration and inspection of all pipes, tanks, faucets, valves and other fixtures by and through which waste water or sewage is used and carried unless said regulations are also a by-law of the town?"

In my opinion, a town which under the provisions of section 2 of said chapter 142 is not subject to the requirements of chapter 142 may, through its board of health, legally regulate the installation of plumbing within the town and make all reasonable requirements incidental thereto with reference to fixtures and methods of construction.

Your fourth question is:

"4. If there is a building inspector in a city or town subject to chapter 142, General Laws, but not subject to sections 8 and 9 of said chapter,

does the board of health have the authority to appoint plumbing inspectors and/or approve plans for plumbing which is subject to inspection?"

Section 11 of chapter 142 provides: "The . . . inspector of buildings, if any, otherwise the board of health, of each city and town, shall . . . appoint . . . one or more inspectors of plumbing . . ." In my opinion, if such a building inspector of a city or town subject to chapter 142 has not appointed a plumbing inspector, the board of health has specific authority to do so. The board of health in such case, with the plumbing inspector, would have full supervision of the installation of plumbing, including approval of plans for plumbing work.

Your fifth question is:

"5. If a town adopts plumbing regulations through a regular town meeting, and no specific reference is made that the action of the voters in adopting said regulations was through section 13, chapter 142, General Laws, does it necessarily follow that said town is automatically subject to sections 1, 3, 6 and 7 and sections 11 to 16 inclusive, as specified in section 2, chapter 142, General Laws?"

The town referred to in your question may or may not be subject to chapter 142. If it is not, it may properly enact its own plumbing regulations. If the town is subject to chapter 142, it may, through its board of health, petition for the formulation of rules relative to plumbing by the examiners under section 8, or the town may by vote of its inhabitants under section 13 enact its own plumbing regulations. In my opinion, the instance referred to in your question would have to be dealt with according to the actual facts of the case. If there is any option open to the town, the vote of the town should disclose its choice in order that there be no confusion as to what the people intended by their vote at town meeting.

Your sixth question is:

"6. If the answer to the foregoing question is 'no', can said town legally appoint a plumbing inspector and require that licensed plumbers only can install plumbing work in said town?"

In my opinion, a town, acting through its officers, can appoint its own plumbing inspector and can by regulation or ordinance require that only plumbers licensed under chapter 142 can install plumbing in said town.

Your seventh question is:

"7. Does the last sentence of section 2, chapter 142, General Laws, make it optional that a town, regardless of size of population, enact a by-law as prescribed in section 13, chapter 142, General Laws, if said town never 'accepted corresponding provisions of earlier laws' as set forth in section 2, chapter 142, General Laws?"

Section 2 of chapter 142 states the application of the various sections of the chapter. The last sentence of this section states:

"Sections one, three, six and seven and sections eleven to sixteen, inclusive, shall apply to all towns which by vote of their inhabitants accept said sections or have accepted corresponding provisions of earlier laws, and said sections, except section thirteen, shall apply to all towns which accept rules formulated by the examiners under sections eight and nine or have accepted them under corresponding provisions of earlier laws."

It is my opinion that if a town has not accepted corresponding provisions of section 13 under earlier laws, and the town is subject to the provisions of section 13, then the town has the option of petitioning the examiners under section 8 for the formulation of regulations relative to plumbing or of adopting its own plumbing regulations by ordinance or by-law under section 13.

Your eighth question is:

"8. Has the Board of State Examiners of Plumbers the authority to restrict the issuance of permits to perform plumbing to master plumbers only in Rules relative to Plumbing formulated by said Board under sections 8 and 9, chapter 142, General Laws?"

Sections 8 and 9 of chapter 142 apply to the formulation of plumbing rules and regulations by the examiners for towns which petition for them. These sections, together with all sections of chapter 142, concern the installation and inspection of plumbing work and materials by those qualified to do so. Section 1 defines a master plumber and a journeyman plumber, a practical plumber and a registered plumber. Section 3 precludes anyone from working as a master plumber or journeyman plumber unless he is registered or licensed under chapter 142. In my opinion, the examiners have no authority in formulating rules for a town under section 8 to provide that only master plumbers may obtain plumbing permits.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Military or Naval Service — Merchant Marine — State Employee.

APR. 2, 1946.

HON. THOMAS H. BUCKLEY, *Chairman, Commission on Administration and Finance.*

DEAR SIR: — In reply to your letter of March 20th, I advise you that an employee of the Commonwealth who leaves his employment for the purpose of serving and who does serve in the "Merchant Marine" is not one who leaves the service of the Commonwealth for the purpose of entering the "military or naval forces of the United States," as the quoted words are used in St. 1941, c. 708, § 1 and 2, nor as used in section 24 of said chapter 708.

Service in the "Merchant Marine" is service under the War Shipping Administration, an agency of the United States established by an Executive Order of the President of February 7, 1942. It is apparent from the provisions of such Executive Order and of Acts of Congress implementing the same of March 24, 1943 (50 U. S. C. A., §§1138–1295), and of June 23, 1943 (50 F. C. A., Appendix 62), that such service is not service in the army or navy of the United States and, although a person in such service is an employee of the Federal Government for certain purposes, as described in said acts, he is not a member of the "naval forces" of the United States.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Approving Authority of Schools for Nurses and Attendants — Examinations.

Apr. 2, 1946.

Mrs. Mae Manning, *Director of Registration.*

Dear Madam: — On behalf of the Approving Authority of Schools for Nurses and Schools for Attendants you have asked my opinion.

"as to the eligibility for license by examination of attendants who graduated from Schools for Attendants previous to the approval of said schools by the Approving Authority."

If by the above-quoted language in the request for my opinion you refer to attendants who were graduated prior to October 1, 1944, from schools which have not been approved by the said Approving Authority and who did not take an examination under St. 1941, c. 620, §§ 7 and 8, I must advise you that such attendants cannot now under the terms of G. L. (Ter. Ed.) c. 112, § 74A, take the examination, which is a prerequisite to a license, until they are graduated from an approved school.

If it is felt that the provisions of said section 74A, read with the provisions of St. 1941, c. 620, §§ 7 and 8, have worked an unreasonable hardship upon a body of attendants who were graduated, before the provisions of existing law became effective, from unapproved schools, resort should be had to the Legislature for relief.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Bridge — Duty of Metropolitan District Commission to Maintain Neponset Bridge.

Apr. 4, 1946.

Hon. William T. Morrissey, *Chairman, Metropolitan District Commission.*

Dear Sir: — You have asked my opinion as to whether it is the duty of your commission to maintain the paved area between the street car rails on Neponset Bridge.

I am of the opinion that such is the duty of your commission.

Gen. St. 1915, c. 300, under the authority of which said bridge was constructed, provided for an assessment upon the cities whose highways crossed the bridge and upon the street railway having a location on the bridge at its completion for payment on serial construction bonds. Section 10 of said chapter 300 provided that after completion the care and control of the bridge should vest in the Metropolitan Park Commission to whose duties your commission has in this respect succeeded, and in section 11 the Park Commission was charged with the duty of maintaining and operating the bridge for the purpose for which the highway crossing it may be used. No provision appears in said chapter 300 placing the duty of repairing the area between its rails upon the street car company having a location on the bridge. The context of said chapter 300 would appear to indicate an intent upon the part of the Legislature to place the duty of repair and maintenance of all parts of the bridge upon the commission.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

State Examiners of Plumbers — Department of Public Safety — Regulations and Rules of both Bodies.

Apr. 8, 1946.

Mrs. Mae Manning, *Director of Registration.*

Dear Madam: — In behalf of the State Examiners of Plumbers you have asked the following question:

"Does Paragraph 41 (local ordinances) in Part 2, Section 6 of the Regulations of the Department of Public Safety, Form B–1, (relative to schoolhouses) give the State Board of Examiners of Plumbers the authority to require a licensed plumber to install plumbing in schoolhouses erected under this section and to inspect such plumbing work installed."

G. L. (Ter. Ed.) c. 143 was amended by St. 1943, c. 544, as a result of the Cocoanut Grove fire and in general the amendments had to do with the granting of great authority to the Department of Public Safety to make rules and regulations relative to the construction of buildings in which the public have a right of access, which includes the construction of schoolhouses.

The regulations formulated by the Department of Public Safety are now contained in Form B–1 and state in Part II, section 6, paragraph 41, the following:

"*Local Ordinances:* Except as otherwise specified or directed, the installation of the above fixtures, together with the required fixtures in the laboratories, gymnasium toilets and kitchen, shall be in accordance with plumbing ordinances or rules of the city or town in which the building is located, if such exist; otherwise, in accordance with the plumbing rules formulated by the State Examiners of Plumbers."

In my opinion, it was the intention of the Legislature in granting this authority to the Department of Public Safety that in those cities and towns of the Commonwealth where no plumbing ordinances or rules exist, rules and regulations for the installation of plumbing (in such instances formulated by the State Examiners of Plumbers) would include the right of the State Examiners of Plumbers to provide that only those persons licensed by them to install plumbing should perform the work called for in their rules.

I therefore answer your specific question in the affirmative.

Very truly yours,

Clarence A. Barnes, *Attorney General.*

Police — Military Leave of Absence — Termination of Leave.

Apr. 10, 1946.

Hon. Thomas F. Sullivan, *Police Commissioner of the City of Boston.*

Dear Sir: — You have in a recent letter advised me as follows:

"This department is confronted with the following situation: Members of the uniformed force who were granted leave of absence for the purpose of serving in the armed forces, and who have been honorably discharged or released from active duty therein, show no inclination to claim their rights for reinstatement under the foregoing law.

Information has been received that some of these men are not residing within the limits of the city of Boston and are engaged in other occupations.

The Rules and Regulations laid down for the guidance of this department require that all members of the uniformed force reside within the limits of the city of Boston; and, further, that members of the force are forbidden to engage in any other occupation.

An opinion is requested from you as to whether the members of our force, who have been granted indefinite leave of absence for the purpose of serving in the armed forces in time of war, and who have terminated their service therein, are allowed:

(1) To engage in other occupations; and

(2) Live outside of the limits of the city of Boston, in violation of the Rules and Regulations of the Boston Police Department."

Following a long line of practice and procedure of this department, the Attorney General advises the Police Commissioner of Boston only upon questions connected with the commissioner's duties which are related to statutes governing his office and duties. Your present questions may be said to call for guidance as to the proper application of St. 1941, c. 708, and amendments thereof, and consequently may properly be answered. VII Op. Atty. Gen. 735; V Op. Atty. Gen. 394; IV Op. Atty. Gen. 451.

St. 1941, c. 708, as amended, provides that a person who holds a civil service position and is separated from the service of the Commonwealth, or any of its subdivisions, by terminating such service to enter the military or naval forces of the United States, shall within two years after the end of his military or naval service "be reinstated in the office or position previously held by him," if he complies with certain stated conditions.

I am of the opinion that it was not the intent of the Legislature, as expressed in the applicable statutes, that during this period of two years an employee who left his employment to enter the military or naval forces of the United States, although he is said by the language of St. 1941, c. 708, § 1, as amended by St. 1943, c. 548, to "be deemed to be . . . on leave of absence," should, before his reinstatement, be considered as still in the service of the Commonwealth, or a political subdivision, in such a sense that his occupations or manner of living are subject to regulation by departmental rules.

It follows that in answer to your questions I must advise you that members of your force on leave of absence by reason of their entering the military or naval forces of the United States are, for a period of two years after their termination of service with said forces and before their reinstatement, allowed to engage in other occupations than those of a Boston police officer and may live outside the city of Boston, irrespective of the rules and regulations made for the police force of Boston.

Very truly yours,

Clarence A. Barnes, *Attorney General.*

State Employees — Days off Duty — Additional Pay.

Apr. 12, 1946.

Hon. Francis X. Lang, *Comptroller.*.

Dear Sir: — You have asked my opinion as to whether, under the provisions of St. 1945, c. 565, which amend G. L. (Ter. Ed.) c. 30, by inserting a new section 24A, superintendents and assistant superintendents of State institutions are entitled to the additional day's pay provided for by said chapter 565, "for working on a state-wide legal holiday when an additional day off cannot be given by reason of a personnel shortage or other cause."

Said section 24A as so inserted provides:

"If any *person* employed by the commonwealth is required to work on (names of legal holidays here inserted) he shall be given an additional day off, or, if such additional day off cannot be given . . . he shall be entitled to an additional day's pay. . . ."

It is to be noted that the benefits of said section 24A are not conferred upon "employees" of the Commonwealth but upon "any *person* employed by the commonwealth." The word "person" as here used by the Legislature is sufficiently broad in scope to indicate an intent to include officers as well as employees within its sweep. The fact that the words "state employees" appear in the title of said chapter 565 does not indicate a contrary legislative intent. The title of an act may be considered in construing a statute but it does not control the meaning of the words of the statute when, as here, they do not appear to be of doubtful meaning. *Opinion of the Justices*, 309 Mass. 631, 639–640; *Charles I. Hosmer, Inc.* v. *Commonwealth*, 302 Mass. 495, 501.

Moreover, the word "employees" is not of itself without ambiguity. It is sometimes used by the Legislature as comprehending within its meaning both officers and employees (*Russell* v. *Secretary of the Commonwealth*, 304 Mass. 181, 184, 185), and as so used has the same connotation as the word "person" appearing in the text of said section 24A.

There is nothing in the opinion of June 4, 1936, of one of my predecessors in office, to which you refer in your letter, that is in conflict with the views herein expressed.

It follows that the incumbents of those places to which you have referred in your letter — superintendents and assistant superintendents of certain institutions — whether they are to be regarded as officers or as employees of the Commonwealth, are entitled to receive the benefit of the provisions of said section 24A.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Board of Registration in Embalming and Funeral Directing — Rules — Registration — Maintenance of an Establishment by Applicant for License.

Apr. 18, 1946.

Mrs. Mae Manning, *Director of Registration.*

Dear Madam: — The Board of Registration in Embalming and Funeral Directing has through you asked my opinion as to the validity of its Rule 35A. This rule reads:

"No person successfully passing an examination for registration as a Funeral Director, shall be so registered unless he furnishes to the Board within ninety days after notification of his passing said examination, proof that he maintains within the Commonwealth an establishment so constructed and equipped as to permit the decent and sanitary handling of dead human bodies."

The Legislature in G. L. (Ter. Ed.) c. 112, § 83, as amended by St. 1945, c. 596, § 2, appears to have covered the subject matter of the requirements for registration of a funeral director and after setting them forth has stated that one meeting such requirements

"shall be *registered* by the board as qualified to be licensed under section forty-nine of chapter one hundred and fourteen as a funeral director."

It has then added the following proviso:

"provided, that he shall not be so *licensed* until he furnishes satisfactory proof to the board that he maintains within the commonwealth an undertaking establishment so located, constructed and equipped as to permit the sanitary handling of dead human bodies and maintains in such establishment suitable equipment for such handling."

Licensing of funeral directors is not done by your board but by boards of health of municipalities under G. L. (Ter. Ed.) c. 114, § 49, upon terms and conditions prescribed by your board. They are permitted by said section 49 to issue such licenses only to persons certified to them by your board as qualified to be licensed.

The duty of *registering* funeral directors is placed upon your board and you are also charged with the duty under said section 49 of certifying to the local boards of health those registered funeral directors who are qualified to be licensed.

Since it is provided by said section 83 that no registered funeral director shall be "so licensed until he furnishes" to your board satisfactory proof that he maintains an establishment described in section 83, you may not certify to the local boards as qualified to be licensed any funeral director, though registered, who has not satisfied your board that he maintains such a required establishment.

The Legislature has not limited the time within which a funeral director whom you have registered may furnish you with the required proof that he has maintained the required establishment. Since the Legislature has covered the whole subject of registration, certification and licensing in a detailed manner and has not indicated an intent to limit the time within which the required establishment may be set up and its existence proved to the satisfaction of your board, I am of the opinion that your board may not itself by a rule fix a limitation upon the time in which a funeral director may furnish you with such proof.

In view of the character of the enactment, it would seem that the Legislature, if it had intended to allow only a limited time in which a newly registered funeral director might locate, equip and maintain the required form of establishment after registration, would have stated such intention in plain words.

Accordingly, I answer your question to the effect that the rule in question is so opposed to the intent of the statute as to be invalid.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Bonus — Members of United States Coast Guard Temporary Reserve on Full Time Duty with Pay.

Apr. 18, 1946.

Hon. John E. Hurley, *Treasurer and Receiver General.*

Dear Sir: — I am in receipt from you of the following letter:

"I respectfully request a formal opinion from your office relative to whether or not a member of the United States Coast Guard Temporary Reserve who served 'full time duty, with pay' is entitled to receive the bonus provided by St. 1945, c. 731.

Kindly find enclosed a copy of a letter from the United States Coast Guard dated February 28, 1946 in connection with the aforementioned matter."

In an opinion to you of January 30, 1946, upon the facts of which you then advised me and upon certain information furnished by the United States Coast Guard, I expressed the opinion that men who have served in the "Special Temporary Enlistment" in the United States Coast Guard Reserve and possess the necessary qualifications set forth in St. 1945, c. 731, were eligible to the "bonus" but that those who had been members of the "Temporary Reserve" as civilian volunteers for part time service only, could not be said to be entitled to receive the bonus.

From further facts of which you now advise me and from statements of the United States Coast Guard, it would appear that there is one group among such Temporary Reserve which is entitled to the bonus. This is a group composed of those members of the Coast Guard Temporary Reserve who, prior to December 12, 1942, were on a full time pay status and were performing hazardous duty under an enrollment and not under a government contract with the Coast Guard. Persons who served in this group would appear to be entitled to be regarded as members of the Coast Guard Reserve and as such entitled to the bonus.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Chelsea Excise Board — Rules and Regulations — Requirements for License to Sell Alcoholic Beverages.

Apr. 18, 1946.

Chelsea Excise Board.

Dear Sirs: — You have asked my opinion as to your authority to make "rules" and as to the validity of certain "conditions" of licenses which you have previously formulated, a list of them being enclosed with your communication.

Under the previous practice of this office, your questions are such as may properly be answered by the Attorney General, since they concern your authority as derived from the statutes, in view of the peculiar manner in which your board is created under Sp. St. 1916, c. 310.

I must advise you that your board has not been vested by the Legislature with authority to make "rules" or "regulations" as the quoted words are customarily used. Such authority to make regulations has been given to the State Alcoholic Beverages Control Commission alone (G. L. (Ter. Ed.) c. 138, § 24, as amended).

Nevertheless, you have been given the power to establish "requirements" in connection with licenses which you issue (G. L. (Ter. Ed.) c. 138, § 15, as amended). Such requirements appear to have been made by you under the name of "conditions" with regard to licenses and are embodied in the list which you have laid before me.

The "requirements" which you may make under the legislative grant of authority contained in said G. L. (Ter. Ed.) c. 138, § 15, are limited by said section 15 to those

"with respect to licenses under said sections (12, 14, 15) or to the conduct of business by any licensee thereunder."

Of the "requirements" or conditions set forth in said list, all appear to be within the purposes indicated by the Legislature in the above-quoted portion of said section 15, and to be reasonable as implementing the applicable statutory provisions with the exception of that numbered 2. b, which reads:

"The holders of corporation stock under an alcoholic beverages license shall not sell or otherwise dispose of their stock until they have received the approval of the Licensing Board."

This requirement appears to go beyond the legislative grant of authority as set forth in said section 15, and deals with a subject which does not appear under any reasonable construction of said section 15 to be comprehended within the enumerated purposes as to which you may make "requirements," and, accordingly, is outside your powers to formulate as one of the "requirements" or conditions of licenses and, consequently, is not, in my opinion, valid.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Bonus — Dependent of Deceased Serviceman.

APR. 18, 1946.

HON. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You have asked my opinion upon two questions of law with relation to the bonus. The first reads:

"I respectfully request a formal opinion from your office relative to whether an applicant who was in the status of a person in loco parentis to the deceased serviceman and not a dependent or heir-at-law is eligible to receive a 'bonus' under the provisions of St. 1945, c. 731, § 3."

The applicable portion of St. 1945, c. 731, reads:

"SECTION 3. In the case of the decease of any person who would if alive be entitled to the benefits of this act, the sum named therein shall be paid to his dependents, if any, and otherwise to his heirs-at-law; provided, that if there is more than one dependent or heir-at-law, payments shall in either case be made in such proportions as the state treasurer shall determine, and in determining the order of precedence so far as practicable the following order shall be observed: wife and children, mother or father, brother or sister, other dependents; provided, however, that no right or payment under this act shall be subject to the claims of

creditors, capable of assignment, regarded as assets, legal or equitable, of the estate of the deceased or made the basis for administration thereof."

Unless the person who occupied the status of one "*in loco parentis*" was in fact a dependent of a deceased serviceman, or if not a dependent was an heir-at-law, he is not entitled to payment of the so-called bonus.

A person is said to be "*in loco parentis*" to another when he assumes the discharge of parental duties without going through the form of adoption. He need not be an heir-at-law or even a relative, nor does he become so by charging himself with such duties. Such a person standing *in loco parentis* to a child is entitled to his services and earnings, and it is possible that he might be a "dependent" of the child, though this would seem to be highly unusual. Dependency in a particular instance is a matter of fact to be determined by a consideration of all material factual circumstances connected with the specific relationship under consideration.

Your second question reads:

"I also respectfully request a formal opinion relative to whether an applicant who was in the status of a person in loco parentis to the deceased serviceman and not a dependent is eligible to receive a 'bonus' in preference to non dependent brothers and sisters under the provisions of St. 1945, c. 731, § 3."

In view of the considerations which I have set forth in answer to your first question, I answer your second to the effect that such a person as you describe, who was not a dependent, though acting *in loco parentis* to a serviceman, is not eligible to receive a "bonus" in preference to non-dependent brothers and sisters.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Bridges — Transfer of Duty to Maintain to Department of Public Works.

APR. 29, 1946.

HON. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — I am in receipt from you of the following letter:

"There are four bridges included in the list of bridges transferred to this department under the provisions of St. 1945, c. 690, which are questionable as to their eligibility for transfer under the act. These bridges are Boston, Mass. Avenue over Huntington Avenue (Route 9); Boston, Canterbury St. over Morton St. (Route 3); Fall River, Eagle St. over Broadway Extension (Route 138); Fall River, Ferry St. over Broadway (Route 138).

The streets on these bridges are not on numbered auto routes, but the bridges themselves are over numbered auto routes. The act states in part '. . . every public highway bridge . . . on a through route.'

It is respectfully requested that you render an opinion on the eligibility of these four bridges under St. 1945, c. 690."

The Attorney General does not pass upon questions of fact. Your statement of fact is to the effect that "the streets on these bridges are not on numbered auto routes, but the bridges themselves are over numbered auto routes."

If by the words "auto routes" you mean *through routes*, as the underlined words are used in St. 1945, c. 690, § 1, you would appear to state as a matter of fact that none of the bridges are "located on a through route" as the quoted words are employed in said section 1, but rather that they extend over and across such a through route.

If this is so, they do not come within that class of bridges which is transferred to your department, and the cost of the care, control and maintenance of which is to be paid out of the Highway Fund by the provisions of said section 1, which in the part applicable to your inquiry reads:

"On January first, nineteen hundred and forty-six, the care, control and maintenance of every public highway bridge with a clear span of not less than twenty feet located *on a through route* . . . are hereby transferred to the department of public works and thereafter such bridge shall be a state highway and the cost of the care, control and maintenance thereof shall be paid out of the highway fund . . ."

See Opinion of the Attorney General to the Commissioner of Public Works, August 10, 1945.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Payment of Public Money for Private Purposes.

MAY 2, 1946.

Committee on Metropolitan Affairs.

DEAR SIRS: — You have asked my opinion as to the constitutionality, if enacted into law, of House Bill No. 1158, which is as follows:

"AN ACT PROVIDING FOR THE PAYMENT OF SUMS OF MONEY BY THE METROPOLITAN DISTRICT COMMISSION TO THE OWNERS OF PROPERTY ALONG THE WINTHROP SHORE DRIVE TO COMPENSATE THEM FOR DAMAGES CAUSED BY THE STORM IN DECEMBER, NINETEEN HUNDRED AND FORTY-FIVE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

The metropolitan district commission is hereby authorized to pay such sums of money to the owners of property located along Winthrop shore drive in the town of Winthrop to compensate them for damages suffered by them by reason of the storm of December, nineteen hundred and forty-five. Payments under this act shall be paid, subject to appropriation, from the metropolitan district funds."

In my opinion, this measure, if enacted into law, would not be held to be constitutional.

From the form of this bill as drafted, it would appear to be a measure for the payment of money merely for the purpose of relieving certain property owners from loss caused by a calamity in the nature of an act of God. There is nothing in the bill to indicate that any moral obligation on the part of the committee to such property owners can be predicated from the occurrence of the storm therein referred to or that an appropriation of public money for other than a private purpose is intended to be authorized.

The use of public money for private purposes is not permitted by our Constitution (c. II, § I, art. XI; c. I, § I, art. IV). *Lowell* v. *Boston*, 111 Mass. 454.

In *Lowell* v. *Boston*, the Supreme Judicial Court held (at page 473) that a bill providing for the use of public money to aid owners of property destroyed by fire being an expenditure "for private and not for public objects, in a legal sense, it exceeds the constitutional power of the Legislature."

See also *Opinion of the Justices*, 186 Mass. 603, 605; *Opinion of the Justices*, 313 Mass. 779, 782; *Kingman* v. *Brockton*, 153 Mass. 255. VIII Op. Atty. Gen. 99, 100.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Bonus — Construction of the Word "Served" in St. 1945, c. 731, § 1.

MAY 3, 1946.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — In a recent letter you have asked my opinion as to the meaning of the word "served" as it appears in the fifth line of St. 1945, c. 731, § 1, in the phrase

"To each person who shall have served in the armed forces of the United States . . ."

with relation to those entitled to receive the so-called "bonus" under the terms of said section 1.

I am of the opinion that, by the use of the word "served" in said phrase in connection with the other words therein employed, it was the intent of the Legislature to describe those persons who had been inducted into or sworn into the armed forces of the United States without regard to the particular duties to which they were thereafter assigned or as to the active or inactive character of the service which was required of them thereafter by the armed forces prior to discharge.

Accordingly, I advise you that in each of the four instances which you have set forth, the respective applicants for the "bonus" would be entitled to the same by virtue of having "served" in the armed forces if, as you state, they possess "the other requirements" called for by said chapter 731.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — City Employee — Probationary Period.

MAY 7, 1946.

Hon. JAMES E. O'BRIEN, *Chairman, Civil Service Commission.*

DEAR SIR: — Your commission through you has in a recent letter requested my opinion in relation to a former employee of the city of Lawrence. Your letter reads:

"Request was made for the reinstatement of Mr. Libby by the Director of Engineering, who is the appointing authority in the Lawrence Street Department, but this request was denied by the Director of Civil Service,

inasmuch as it was ruled that Mr. Libby was not entitled to the benefits of the Civil Service Law as he was dropped from employment during his probationary period.

The facts in the case are as follows:

1–4–38: Mr. Libby appointed as laborer in the Lawrence Street Department.
3–15–40: Labor service of Lawrence classified under Civil Service.
9–12–40: Mr. Libby was discharged.

Mr. Libby was subsequently employed from time to time beginning in 1943, on an emergency and provisional basis.

Mr. Libby appealed the Director's decision denying his reinstatement and at a hearing before the Commission on April 9, 1946, stated that his reasons for his dismissal was his refusal to buy the position.

We hereby request your opinion as to whether or not you believe, in view of the reason for Mr. Libby's discharge, he is entitled to reinstatement because of his services from January 1938 to September 1940."

You do not state whether or not the commission has found that the facts alleged by the employee with relation to his discharge are as he has stated them. The Attorney General does not pass upon questions of fact.

Irrespective, however, of the truth or falsity of the statements which you inform me were made by the employee concerning his discharge, your commission, in my opinion, has no authority to reinstate him in the position which you advise me he held on September 9, 1940.

When the labor service of the city of Lawrence was classified under civil service on March 15, 1940, according to your letter, the employee entered upon a six months' probationary period under the provisions of Civil Service Rule 18. During that period he could be discharged at the pleasure of the appointing officer. He was not during that period to be regarded "as holding employment in the classified public service" and was not therefore "an . . . employee . . . of a city . . . who has become separated from the classified civil service," as the last quoted words are used in G. L. (Ter. Ed.) c. 31, § 46C, as amended by St. 1939, c. 236, or as most recently amended by St. 1945, c. 704, which gave to the director a power of reinstatement under designated conditions over "an employee . . . of a city . . . who has become separated from the classified civil service." *Crimmins* v. *Highway Commission of Brockton*, 304 Mass. 161, 171. *See* Attorney General's Report, 1940, pp. 94, 95.

The terms of G. L. (Ter. Ed.) c. 31, § 47A, which specifically exempt from the necessity of serving a probationary period, when a city accepts the provisions of said chapter 31 placing its employees in the classified public service, such employees as have previously worked for such city for at least two years, were not enacted until 1941 by chapter 195 of that year. As is the case with most statutes, chapter 195 is to be construed as prospective, and its provisions have no retroactive effect to exempt this particular employee in relation to his status in the employment of the city of Lawrence during 1940.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Medical Examiner — Associate — Qualifications for Appointment.

May 14, 1946.

His Excellency the Governor and the Honorable Council.

Dear Sirs: — You have through your Executive Secretary sent me the following communication:

"I have been directed by the Governor and Council to request an opinion from you on the following:

Question: May a resident of Suffolk County be appointed an Associate Medical Examiner for Norfolk County?"

I answer your question in the negative.

Since the Legislature in 1877 purported to abolish the office of coroner and transferred many of its duties to medical examiners created by chapter 200 of the acts of that year, and later to associate medical examiners, the word "in" has been continually employed by the Legislature in a line of statutes relative to the appointment of such officers, as in the phrase used in St. 1877, c. 200: "The governor . . . shall appoint, *in* the county of Suffolk not exceeding two, and *in* each other county not exceeding the number to be designated by the county commissioners . . . able and discreet men . . . to be medical examiners" and in R. L. c. 24, § 1:

"shall appoint . . . able and discreet men . . . to be medical examiners and associate medical examiners *in* each county."

It would appear that the preposition "*in*" as so employed indicated an intent on the part of the Legislature that the appointees should be men who were themselves within the counties which they were to serve, as inhabitants or residents. The preposition "*in*," though of a broader meaning than the preposition "for," may embrace the sense of the latter. If the preposition "for" alone had been used in the early statutes, with its narrower connotation, applying, as it would have done, to the county only rather than with any reference to the appointee, it might have been thought that an appointment "*for*" a county could be made of a person not living within the county. This latter use was not adopted by the Legislature, and in the compilation of the statutes in the General Laws of 1921 the compilers added the word "for" to the word "in," thereby emphasizing the intent of the Legislature that the person "in" the county, who was appointed, should after such appointment act "for" the county.

As appearing in the Tercentenary Edition of the General Laws, c. 38, § 1, the applicable provisions read:

"The governor, with the advice and consent of the council, shall appoint . . . able and discreet men . . . as medical examiners in and for their respective counties, and as associate medical examiners in and for their respective districts in counties divided into districts, otherwise in and for their respective counties. . . ."

Very truly yours,

Clarence A. Barnes, *Attorney General.*

Residence — Determination for Certain Purposes.

May 16, 1946.

Mrs. Mae Manning, *Director of Registration.*

Dear Madam: — You have transmitted to me the following communication from Dr. Gallupe:

"Will you be kind enough to request an opinion from the Attorney General's office as to 'how residence in this Commonwealth on a certain date is determined.'

This information is requested with reference to a bill which has recently been passed permitting certain graduates of Middlesex University Medical School to take the examinations for registration as physicians in Massachusetts."

Residence is a question of fact and is to be determined with regard to any particular case in view of all the circumstances affecting the person whose "residence in the Commonwealth" is being considered.

As a matter of law, a person is usually held to be a resident of that place where he is making his home with no immediate intention of removing therefrom. As of a given date a person's residence is to be determined by considering all the factors which then existed and throw light on his place of abode and his intentions with regard to it. Disposition of a family, registration as a voter, membership in local organizations, and place of permanent employment are some of the determining factors.

A person away from his home at an institution, living at such institution or nearby, solely for the purpose of obtaining an education, having no present intention of making his place of living a permanent abode, would not ordinarily be held to be a resident of such place. *Granby* v. *Amherst*, 7 Mass. 1, 5. *Opinion of the Justices*, 5 Met. 587, 589.

Very truly yours,

Clarence A. Barnes, *Attorney General.*

Civil Service — Chief Engineer in Town — Term of Office.

May 18, 1946.

Hon. Thomas J. Greehan, *Director, Division of Civil Service.*

Dear Sir: — In a recent letter you have advised me that one Hargreaves was formerly chief engineer of the Board of Fire Engineers of North Andover; that his term of office expired on April 30, 1946; that a new board took office on May 1, 1946, and that he was not reappointed.

With relation to these facts you have asked me the following question:

"I hereby request your opinion as to whether James Hargreaves, the incumbent of the position of Chief Engineer of the Board of Fire Engineers at the time of the passage of St. 1945, c. 425, and the acceptance by the voters of that town, may now be subjected to a non-competitive qualifying examination and given a civil service status if he passes such an examination, by reason of the amendment to St. 1946, c. 266."

St. 1945, c. 425, provided that upon its effective date —

"The office of chief of the fire department of the town of North Andover shall . . . become subject to the civil service laws and rules and regula-

tions relating to permanent members of fire departments in towns, and the tenure of office of any incumbent thereof shall be unlimited, subject, however, to said laws, but the person holding said office on said effective date shall continue to serve therein only until the expiration of his term of office unless prior thereto he passes a non-competitive qualifying examination to which he shall be subjected by the division of civil service."

The act was to take effect upon its adoption by the voters of the town. You inform me that it was accepted by the voters on March 4, 1946.

You also inform me that there was no such office as "chief of the fire department in the town of North Andover" and that corrective legislation was enacted by the General Court in the form of the following statute, St. 1946, c. 266, which became effective May 2, 1946:

"AN ACT RELATIVE TO PLACING UNDER THE CIVIL SERVICE LAWS THE OFFICE OF THE CHIEF ENGINEER OF THE BOARD OF FIRE ENGINEERS OF THE TOWN OF NORTH ANDOVER.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The reference to the office of chief of the fire department of the town of North Andover in chapter four hundred and twenty-five of the acts of nineteen hundred and forty-five shall be held to refer to the office of chief engineer of the board of fire engineers of said town to the same extent as if said last mentioned office were specifically referred to therein.

SECTION 2. This act shall take effect upon its passage."

You further inform me that said Hargreaves now asks that he be given a non-competitive qualifying examination for the position of chief engineer of the Board of Fire Engineers.

Since Hargreaves was the chief engineer of the fire department on the effective date of said St. 1945, c. 425, he was, by force of the provisions of said chapter 425, entitled to serve therein with unlimited tenure but only if he passed a non-competitive qualifying examination before the expiration of his then term of office. These provisions were not extended with relation to such tenure by St. 1946, c. 266.

Inasmuch as Hargreaves' term expired, as you inform me, without his having passed such an examination, he is not now entitled to take one and to be given "a civil service status."

It is true that Hargreaves, by reason of the manner in which the two statutes were drawn and the effective date of the latter one, never had an opportunity during his term of office to take an examination. Since this is so, further corrective legislation might be sought from the General Court.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State Retirement System — Retirement at Seventy — Not Applicable to a Certain Employee Entering Service in 1901.

MAY 27, 1946.

DR. VLADO A. GETTING, *Commissioner of Public Health.*

DEAR SIR: — You have in a recent letter advised me that a certain employee in your department entered the service of the Commonwealth in 1901, that is, before the establishment of the State Retirement System,

which was set up in 1912; that such employee exercised the privilege afforded him by St. 1911, c. 532, § 3 (1), and duly signified his desire not to become a member of the system. You state that said employee has passed the age of seventy and you ask if he may still continue in the service of the Commonwealth.

I advise you that, in view of the facts which you have set forth in your letter, the employee may continue in such service and is not required to leave by reason of the age which he has attained.

The provisions of law which require retirement of one in the service of the Commonwealth at the age of seventy are contained in the Contributory Retirement Law (G. L. (Ter. Ed.) c. 32, as amended by St. 1945, c. 658).

By the provisions of this law:

(1) *A member of the retirement system*, with certain exceptions not here material, must retire at the maximum age permitted for employees of the group in which his position has been established by the Legislature in said chapter 32, which age for an employee such as the one in question would be seventy. This employee, however, is not a member of the retirement system.

(2) A non-elective employee not a State official as defined in section 1 of said chapter 32, as amended, who was over fifty-five when he originally entered the service of the Commonwealth, may not be a member of the system but must retire at the same age as those holding positions in "the group in which he would have been classified if he had become a member" of the retirement system. This employee obviously was not over fifty-five in 1901 when, as you state, he originally entered the service (see G. L. (Ter. Ed.) c. 32, § 3 (2) (*e*) (*f*), as amended).

Similar provisions requiring the retirement for superannuation of the holders of positions in the groups set up in a like manner in G. L. (Ter. Ed.) c. 32, before its amendment in 1945, were contained in said chapter 32 prior to 1945 (see 1932 Op. Atty. Gen. 42, 43).

There is no other provision of law which could be thought applicable to the compulsory retirement of this employee at the age of seventy or at any other age. He belongs to a small class of employees whose compulsory retirement at seventy is not required by the statutes.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Bonus — Authority of Treasurer to Pass upon Claims may not be delegated.

MAY 28, 1946.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You have asked my opinion by a recent letter in the following terms:

"Your opinion is respectfully requested as to the right of the State Treasurer to establish a board of appeal on bonus claims, under the provisions of St. 1945, c. 731."

I know of no authority which has been given you either by St. 1945, c. 731, or by any other statute, to establish a board of appeal on "bonus claims."

The duty of acting either favorably or unfavorably upon all applications for the "bonus" which may be made under said chapter 731 has been

placed upon you as Treasurer by section 8 of said chapter 731, and it is for you alone, in the exercise of sound judgment, to pass upon such claims or applications. This is not a duty which can be delegated by you nor is it a duty which the Attorney General is empowered to perform for you, nor does any "appeal" lie from your decision upon an application or claim for a "bonus" to the Attorney General or to any other administrative or executive officer.

There is no provision of the statutes which directly or by implication indicates that your decision shall not be final, except as it might under certain contingencies be subject to judicial review in the courts.

Most of the questions which arise in connection with applications under said chapter 731 will be questions of fact. Questions of fact are never passed upon by the Attorney General but are, in connection with such applications, exclusively for your own determination.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State Board of Retirement — Employees of certain Institutions — Classification.

JUNE 6, 1946.

Hon. JOHN E. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — You have recently written me as follows:

"As directed by a vote of the State Board of Retirement, I respectfully request your opinion as to the rights of certain employees in the following institutions to be classified in Group B within the provisions of section 3, paragraph (ix) (*g*), chapter 658, Acts of 1945: Belchertown State School; Walter E. Fernald School for Feeble-Minded; Wrentham State School; State Hospital at Monson for Epileptics.

This particular paragraph reads as follows:

Employees of the commonwealth and of any county, regardless of any official classification, whose regular and major duties require them to have the care and custody of prisoners or insane persons or of defective delinquents at the state farm.

With further reference to this matter, section 7 (15), chapter 4 of the General Laws sets up the following definition of an insane person:

'Insane person' and 'lunatic' shall include every idiot, non-compos, lunatic and insane and distracted person."

With relation to such employees at the schools above mentioned whose principal duties relate to the care and custody of feeble-minded persons, I am of the opinion that they do not come within the terms of the paragraph quoted by you above from St. 1945, c. 658, and so do not fall within the class of employees therein mentioned who are to be classified in Group B (St. 1945, c. 658, § 3 (ix) (*g*)) and whose maximum age of retirement is sixty-five as against seventy for those in Group A (St. 1945, c. 658, § 1).

The context of G. L. (Ter. Ed.) c. 123, dealing with the commitment and care of the insane, indicates that the Legislature has made a plain distinction between feeble-minded persons and those who are insane, and that, accordingly, the definition of "insane person" in G. L. (Ter. Ed.) c. 4, § 7, quoted by you above, does not, with relation to the words "insane persons" as used in St. 1945, c. 658, § 3, include within its sweep

feeble-minded persons, since said statutory definition by its terms is not to apply when "a contrary intention clearly appears." *Chapin* v. *Lovell*, 194 Mass. 486. In so far as these views may be in opposition to any statement in an opinion of one of my predecessors in office in 1939 Op. Atty. Gen. 64, I am not in accord with such statement, though I do not differ upon the point actually decided in such opinion.

With regard to employees in the "State Hospital at Monson for Epileptics," I am of the opinion that such employees whose duties are the care and custody of epileptics are not to be classified in said Group B, except such as have the care and custody of insane epileptics referred to in G. L. (Ter. Ed.) c. 123, § 69, as amended. A reasonable interpretation of the quoted definition of "insane person" in said G. L. (Ter. Ed.) c. 4, § 7, cannot include epileptics as such within its meaning. Morever, the Legislature in said G. L. (Ter. Ed.) c. 123, has clearly indicated an intent to distinguish epileptics as such from those in the category of insane persons.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Civil Service — Assistant Insurance Attorney — Classification.

JUNE 7, 1946.

HON. THOMAS J. GREEHAN, *Director, Division of Civil Service.*

DEAR SIR: — You have asked my opinion as to whether the newly created place of "assistant insurance attorney" in the Division of Insurance of the Department of Banking and Insurance is within the classified civil service under the provisions of G. L. (Ter. Ed.) c. 31.

I am of the opinion that such place is within the classified civil service.

By the provisions of G. L. (Ter. Ed.) c. 26, § 7, as amended, the Commissioner of Insurance is authorized to appoint certain designated officers with the approval of the Governor and Council. Such officers by reason of the method of appointment subject to such approval are not within the classified civil service (G. L. (Ter. Ed.) c. 31, § 5, as amended). Neither the office of insurance attorney nor that of assistant insurance attorney is among such designated offices which are, by the provisions of said section 7, limited to

"a first deputy, an actuary and a chief examiner, and such additional deputies, examiners, assistant actuaries and inspectors as the service may require."

Other employees of the division are by the terms of said section 7 to be appointed by the commissioner and their appointment does not require the approval of the Governor and Council: — these employees are described in said section 7 as "such clerical and other assistants as the work of the department may require."

Since the officers, insurance attorney and "assistant insurance attorney," are not included explicitly or by implication among those who are specifically named as requiring approval of appointment by the Governor and Council, it is manifest that the only mode by which they can be appointed is by action of the Commissioner of Insurance alone, as "clerical" or "other assistants." As the holders of such places of the latter type, they fall within the sweep of the classified civil service.

You have informed me that the duties of the assistant insurance attorney have been set up by the Division of Personnel and Standardization as follows:

"*Title of Class: Assistant Insurance Attorney.*

Definition of Class: Duties: Under general direction, to assist the Insurance Attorney for the Division of Insurance of the Department of Banking and Insurance in investigating complaints, holding hearings, advising the public and the department staff on legal questions relating to insurance, drafting legislative bills, and assisting state officers in prosecution for violation; and to perform related work as required."

Plainly these duties are not such as would appertain to any of those offices which are mentioned in said section 7 as requiring that appointments thereto should be with the approval of the Governor and Council and indicate that the place is that of an "assistant" such as is referred to in said section 7, to be appointed by act of the commissioner alone.

You have not advised me as to the duties of the position of insurance attorney, but I assume that they are not dissimilar to those established for the "assistant insurance attorney." You inform me that your division has ruled over a period of years that the said position of insurance attorney is subject to the civil service laws, and it would seem that your ruling in this respect is correct. The Supreme Judicial Court had occasion to consider the office of insurance attorney with relation to the present incumbent in the case of *Hayes* v. *Hurley*, 292 Mass. 109, and treated its status, as the basis of its opinion, as being within the classified civil service.

It would seem clear that if the insurance attorney is within the classified civil service, the "assistant insurance attorney" is likewise within it, since appointment to the place of the latter rests upon no different statutory authority than appointment to the former, both being governed by the terms of said chapter 26, section 7.

There is nothing in earlier statutes relative to the matter now comprehended in the codification of laws in G. L. (Ter. Ed.) c. 26, § 7, as amended, which could lead to any other interpretation of the provisions of said section 7 than that which I have set forth (St. 1907, c. 576; R. L. c. 118, § 5; St. 1920, c. 181; St. 1924, c. 261; St. 1931, c. 301).

It is not necessary for the purposes of this opinion to determine whether or not the places of insurance attorney and assistant insurance attorney are offices or positions. If they are *positions* only, the approval of the Governor and Council would in no event have a tendency to remove them from the coverage of the civil service. If they are *offices*, there is no provision of law, explicit or implied, as I have indicated, by which the approval of the Governor and Council is required to be given to appointments thereto. In neither case would an appointee to either place fall within that class which is exempted from inclusion in the civil service by that provision of G. L. (Ter. Ed.) c. 31, § 5, as amended, which reads:

"No rule made by the (civil service) commission shall apply to the selection or appointment of any of the following:

. . . officers whose appointment is subject to the approval of the governor and council. . . ."

nor would he come within any other of the excepted classes mentioned in said section 5.

Appropriate classes for employees who may properly be called "clerical and other assistants" have been established by the rules of the Civil Serv-

ice Commission, in some one of which the insurance attorney has been placed, I am informed, under the Civil Service Rules and Regulations, and the assistant insurance attorney should likewise be so placed.

Moreover, as there is no provision of law authorizing, specifically or by implication, the appointment of any "attorney," in the full sense of the quoted word, in or for the Division of Insurance, I assume that the title of the place under consideration is something of a misnomer and that the phraseology which has been adopted to describe its duties, as above set forth, is to be construed so as to mean only duties of a clerical nature, or such as might be performed by an assistant who is not a member of the bar, and not as purporting to authorize the performance by the incumbent of any such legal work or the creation of any such duties as are the sole prerogatives of the Attorney General and his assistants.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Board of Registration in Pharmacy — Approval of Schools and Colleges.

JUNE 18, 1946.

Mrs. MAE MANNING, *Director of Registration.*

DEAR MADAM: — I am in receipt from you of a request from the Board of Registration in Pharmacy for my opinion upon the two following questions:

"1. Are the Board of Registration in Pharmacy and the U. S. Veterans' Administration required to, or may they, in their discretion, approve schools for each veteran of World War II, who is an applicant for examination for registration as a pharmacist?

2. Are the Board of Registration in Pharmacy and the U. S. Veterans' Administration required to set up standards for schools or colleges of pharmacy so that they may be approved by the Board and the U. S. Veterans' Administration; and may they require all veterans applying for registration as pharmacists to be graduated from such schools or colleges?"

St. 1946, c. 272, substitutes the Board of Registration in Pharmacy and the U. S. Veterans' Administration for the said board and the Commissioner of Education (see G. L. (Ter. Ed.) c. 112, § 24, as amended by St. 1945, c. 502) as the approving authority for schools and colleges of pharmacy in so far as veterans of World War II are concerned.

The applicable statutes do not prescribe the mode by which such schools and colleges are to be brought to the attention of the approving authority for the purpose of securing its sanction.

With relation to your first question, I am of the opinion that the approving authority should pass upon the qualifications of any of such schools or colleges as may be brought to their attention for the purpose of being approved either by such an institution itself or by a graduate, who is an applicant for examination.

With regard to your second question, the approving authority is not required by the applicable statutes to set up standards for the said schools and colleges, attainment of which is to be a condition of approval. For the guidance of such institutions, the approving authority might indicate the minimum standards which the authority expects an institution to

maintain if it is to have the authority's approval, but such indication would not in a sense be a rule binding upon the authority nor limit the exercise of the board's discretion in passing upon any individual case coming before it.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Corporation — Fee for Filing a Certain Certificate of Increase of Capital Stock.

JUNE 21, 1946.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — Your recent letter has received my attention relative to the fee to be charged for filing a certificate of an increase of capital stock by adding 350,000 additional shares of common stock without par value, when at the same time the capital stock is being decreased by 150,000 shares of preferred stock with a par value of $10 per share, which has been retired.

Your specific question is whether or not, in determining the fee, there should be credited, against the sum of $3,500, which is one cent per share upon the proposed increase, the sum of $750, which is one twentieth of one per cent of $1,500,000, the amount of the preferred stock by which the capital is decreased by the same vote.

This question arises under G. L. (Ter. Ed.) c. 156, § 54, as most recently amended by St. 1932, c. 180, § 30, which reads as follows:

"SECTION 54. The fees for filing the following certificates shall be as follows:

For filing a certificate providing for an increase of capital stock with par value, one twentieth of one per cent of the amount by which the capital is increased; but not in any case less than twenty-five dollars.

For filing a certificate providing for a change of shares with par value to shares without par value, whether or not the capital is changed thereby, one cent for each share without par value resulting from such change, less an amount equal to one twentieth of one per cent of the total par value of the shares so changed; but not in any case less than twenty-five dollars.

For filing a certificate providing for an increase in the number of shares without par value, whether or not the capital is changed thereby, one cent for each additional share; but not in any case less than twenty-five dollars."

If the transaction to which you refer were a change of shares with par value to shares without par value, the case would come within the third paragraph of the foregoing section and the deduction should be made. Accordingly, I have asked you for a copy of the votes of the corporation relative to the transaction. A copy of the principal vote, with footnote No. 1 thereto, on file in your office, follows:

"*Voted,* That the authorized capital stock of this Company now fixed at 1,550,000 shares of Common Stock without par value and 150,000 shares of 6% Preferred Stock with a par value of $10 each is hereby increased by adding thereto 350,000 additional shares of Common Stock without par value and is at the same time decreased by 150,000 shares

of 6% Preferred Stock, said 6% Preferred Stock having been either never issued or if issued having been either converted into Common Stock or redeemed, so that henceforth such authorized capital stock shall consist of 1,900,000 shares of Common Stock without par value and no Preferred shares, and that the Agreement of Association and Articles of Organization of this Company be and they are hereby amended accordingly."

"*Note 1.* — The 150,000 shares of Preferred Stock with par value already authorized are shares of 6% Preferred Stock of the par value of $10 each. Of these 115,000 shares were authorized to be issued as a stock dividend on the Common Stock as stated in the Certificate of Issue filed December 18, 1937, but only 109,126 of such shares were in fact so issued. Subsequently 47,214 of these shares were retired by being converted share for share into Common Stock leaving only 61,912 shares outstanding at the time of the expiration of the conversion privilege. These 61,912 shares were called and redeemed on April 1, 1946. There are therefore no longer any shares of Preferred Stock outstanding. The foregoing vote eliminates the whole issue of said 150,000 shares from the capitalization of the Company."

From the foregoing, it appears that the preferred stock is not being exchanged for the new common stock without par value, but has heretofore been retired. No change is being made from preferred stock with par value to common stock without par value. It follows that the transaction comes within the last paragraph of section 54, as amended, which expressly taxes at one cent per share an increase in the number of shares without par value, "whether or not the capital is changed thereby." Therefore, no deduction can be made in computing the fee. $3,500 must be paid.

This result follows the opinion of Attorney General Warner dated June 11, 1929. It is not inconsistent with my opinion of August 3, 1945, nor with Attorney General Warner's opinion of August 3, 1932, nor with the decision of the Supreme Judicial Court in *Commonwealth* v. *U. S. Worsted Company*, 220 Mass. 183. Neither said last-mentioned opinions nor said decision related to the issue of stock without par value.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

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